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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1948

No. 182

JOSEPH GIBONEY, HAROLD HACKELL, PAUL MAN-
DALIA, ET AL., APPELLANTS,

vs.

EMPIRE STORAGE AND ICE COMPANY

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSOURI

FILED JULY 29, 1948.

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**IN THE CIRCUIT COURT OF JACKSON COUNTY,
MISSOURI, AT KANSAS CITY, DIVISION NUMBER
THREE, MAY TERM, 1946**

No. 513,031

EMPIRE STORAGE AND ICE COMPANY, a Corporation, Plaintiff,

vs.

JOSEPH GIBONEY, HAROLD HACKELL, PAUL MANDALIA, SAM
IPPOLITO, Harry Weston, Walter Downey, Roy Uttinger,
James Pike, Terrill Henry, A. J. Jenkins, Individually

[Caption omitted]

PETITION FOR INJUNCTION—Filed July 8, 1946

1. The plaintiff, Empire Storage & Ice Company, is a corporation of Missouri engaged in the cold storage and warehouse business and in the manufacture of ice and its sale at wholesale. It receives and has goods, wares, mer-
[fol: 2] chandise for storage from the United States Government, from customers in Missouri and from many states in the Union; and sells ice at wholesale to buyers in Kansas City, the state of Kansas and elsewhere; and is engaged in both intra- and interstate commerce. Its warehouse, cold storage and ice plants are located at Chestnut and Guinotte Streets in Kansas City, Missouri; and its business is large, profitable and well established, and its customers numerous.

2. The individual defendants, and each of them, are members of the Ice and Coal Drivers and Handlers Local Union No. 953, an unincorporated labor union and association in Kansas City, Missouri, and are not employees of plaintiff; that the members of said union are numerous and it is impossible to make all of them parties here, and plaintiff has made such a number of said members parties defendant as will fairly insure adequate representation of all members; and the individual defendants are made parties individually and as representatives of all other members of said union; that the defendant, A. J. Jenkins, is acting President and business agent of said association; that The Ice and Coal Drivers and Handlers Local Union No. 953 is a local labor

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union, an unincorporated union and association located in Kansas City, Missouri.

3. That there is no labor dispute existing between the plaintiff and its employees, and there is no labor dispute [fol. 3] existing between the defendants, and each of them, and this plaintiff; that the employees of plaintiff, except its executives employees, are members of labor organizations and are under contract with plaintiff; that none of plaintiff's employees at said plant are members of defendant's organization.

4. The defendants well knew that plaintiff's employees were members of unions, and that many truck drivers of defendant's patrons and customers were members of unions and would refuse to pass through or cross picket lines if defendants placed picket lines around or about such buildings of plaintiff; that defendants well knew that by placing pickets around or about said buildings would result in the drivers of many of plaintiff's customers refusing to enter said premises for the purpose of delivering or receiving goods there from; that defendants knew that a large portion of the goods, wares, and merchandise, in the course of delivery to plaintiff, was of a perishable nature, and that delays in delivery would result in great loss and damage to plaintiff and plaintiff's customers. Defendants, with such knowledge, have placed pickets about and around the premises operated by plaintiff in its warehouse, cold storage and ice business in Kansas City.

5. Drivers of customers' trucks, a substantial number of [fol. 4] them, have refused and are refusing to pass through or across such picket lines, that defendants are thus preventing said drivers from entering and departing from such buildings and premises and thus interfering with the business of plaintiff in conducting its cold storage, warehouse and wholesale ice businesses, and are thus preventing the union truck drivers employed by customers of plaintiff from delivering goods, wares and merchandise to plaintiff for storage, and from delivering to plaintiff's customers the goods, wares and merchandise and ice from said buildings; that defendants have thus caused and are causing plaintiff's customers to cease delivering goods, wares and merchandise to said warehouse for storage, and preventing the warehouse employees from delivering to its customers goods,

wares and merchandise stored and ice from its premises; and defendants are thus interfering with the business done between plaintiff and its customers and thus causing great and irreparable loss to plaintiff, that such picketing of the buildings and premises of plaintiff was and is for the purpose of forcing and compelling the plaintiff to cease and desist from storing goods, wares and merchandise, and from selling ice to its customers and to the public generally, and to cause employees of plaintiff to break their contracts with plaintiff.

6. That defendants have entered into an unlawful agreement, combination and understanding in restraint of trade, [fol. 5] in the rendition of warehouse cold storage and ice service to the general public, whereunder they have picketed and are, as herein alleged, picketing the buildings of this plaintiff for the purpose of preventing plaintiff from serving its customers in its warehouse, cold storage and ice business, and of carrying out its contracts with said customers as by law required and forcing the customers of plaintiff to patronize rival businesses, industries and enterprises; that, by reason of such interference with the aforesaid business of plaintiff, plaintiff has lost and will in the future lose very substantial amounts of money in charges and profits, the exact amount of which plaintiff is unable to state; that, by reason of such interference with the aforesaid business of plaintiff, defendants are picketing the buildings of this plaintiff for the purpose of forcing non-union truck drivers and contractors, not members of said Local Union No. 953, to join said union.

7. That the picketing of the aforesaid buildings of this plaintiff by the defendants, and each of them, has inflicted and will inflict upon the plaintiff irreparable damage unless restrained and enjoined by order of this Court. It will be impossible to ascertain how much money and business the plaintiff will lose by reason of such picketing, and plaintiff's damages will be impossible of ascertainment; that defendants are insolvent, are unable to respond in money for the very substantial damages that such picketing has caused [fol. 6] and will in the future cause; that innumerable business transactions with strangers to this cause have been and will be suspended, interfered with or prevented, with the result irreparable damage to plaintiff and customers of this plaintiff and the public in general has resulted;

Wherefore, a temporary injunction, and upon the trial of the cause, a permanent injunction is prayed for by the Plaintiff restraining and enjoining the defendants, and each of them, from placing pickets or picketing around and about the buildings of plaintiff used in the cold storage, warehouse and ice business in Kansas City, Missouri, and thereby preventing the ingress and egress to such buildings aforesaid, and interfering with the business of plaintiff and its service to the public, and for such other and further relief as to the Court may seem mete and proper.

Guy B. Park, Attorney for Plaintiff, Empire Storage & Ice Company.

Duly sworn to by W. Ralph Wilkerson. Jurat omitted in printing.

[fol. 7]

[File endorsement omitted]

IN CIRCUIT COURT OF JACKSON COUNTY

ASSIGNMENT OF CAUSE

On Monday, July the 8th, 1946, the same being the 47th day of the regular May, 1946, Term of this Court, said cause was assigned to Division Number Five of the Circuit Court, Jackson County, Missouri.

And afterwards on said Monday, July the 8th, 1946, the same being the 47th day of the regular May, 1946, Term of said Court, comes Plaintiff by his attorney and presents petition for temporary and permanent injunction to the [fol. 8] judge of the court, and comes Clif Langsdale, appearing for the defendants, except A. J. Jenkins, as president of the Ice and Coal Drivers and Handlers Union, No. 953, and objects to the granting of the temporary injunction and restraining order, and the court having considered the same, now makes the following order:

IN CIRCUIT COURT OF JACKSON COUNTY

ORDER ALLOWING TEMPORARY INJUNCTION

Upon reading petition of Plaintiff, it appearing thereby that the plaintiff, under the facts stated in the petition is entitled to the relief prayed for and demanded.

It is ordered, that a temporary restraining order be granted herein enjoining defendants, and each of them, and all members of the Ice and Coal Drivers and Handlers Local Union No. 953 from placing pickets or picketing around or about the buildings of the plaintiff used in the Warehouse, Cold storage and ice businesses located at Chestnut and Guinotte Streets in Kansas City, Missouri, and thereby preventing ingress and egress of the employees of the customers of plaintiff, and interfering with the business of plaintiff and its service to the public, and for such other and further relief as to the court may seem mete and proper until further order of this court upon plaintiff filing with the Clerk a bond in the sum of \$1000.00, conditioned as required by law, with the United States Fidelity and Guarantee Company, a Corporation, as surety.

It is further ordered that defendants be and appear before the Judge of Div. 5, 16th. Judicial Circuit of Missouri, [fol. 9] at the Court House in Kansas City, Mo., at 10 A. M., Thursday, July 11, 1946 and show cause why a temporary injunction shall not issue.

Allen C. Southern, Judge of Circuit Court, Div. 5.

Done this 8th day of July, 1946.

INJUNCTION BOND

Afterwards, to-wit, on said Monday, July 8, 1946, the same being the 47th day of the regular May, 1946, Term, of said court, came the Plaintiff by his attorney and filed injunction bond in the penal sum of \$1000.00 with the United States Fidelity and Guaranty Company, a Corporation, as surety thereon, which said bond was approved by the court.

IN CIRCUIT COURT OF JACKSON COUNTY

ORDER TRANSFERRING CAUSE

On Tuesday, July 9, 1946, the same being the 48th day of the regular May, 1946, Term of said court, the Defendant, A. J. Jenkins, by his attorney, filed Application for and Affidavit in Support of Change of Venue, which said application was by the court taken up, duly heard and considered, and by the court sustained.

Whereupon, the court ordered that this cause, being the same, is hereby transferred to Division Number Three, Circuit Court, Jackson County, Missouri, in which all subsequent proceedings in said cause were had.

[fol. 10] IN CIRCUIT COURT OF JACKSON COUNTY

FIRST AMENDED ANSWER—Filed July 19, 1940

1. Come now the defendants, Joseph Giboney, Harold Hackell, Paul Mandalia, Sam Ippolito, Harry Weston, Walter Downey, Roy Uttinger, James Pike, Terrill Henry and A. J. Jenkins, leave of court having been had and obtained, and file this, their first amended answer, to the petition of plaintiff heretofore filed herein.

2. Each of the said defendants states that he is a citizen of the United States.

3. Said defendants admit the allegations in paragraph 1 of said petition.

4. Said defendants admit, as alleged in paragraph 2 of said petition, that each of them is a member of Ice and Coal Drivers and Handlers Local Union No. 953, and that none of them is an employee of the plaintiff; and admit that the defendant, A. J. Jenkins, is Acting President and Business Agent of the said Union and that Local Union No. 953 is a local labor union and an unincorporated union and association in Kansas City, Missouri. Said defendants deny each and every allegation in said paragraph 2 of said petition, [fol. 11] not herein specifically admitted.

5. Said defendants, answering the allegations of paragraph 3 of said petition, assert that there is a labor dispute existing between the said defendants and the plaintiff, in that plaintiff is selling ice to peddlers who are not members of the said defendants' union. Said defendants are not sufficiently informed to plead to the allegations of said paragraph.

6. Answering paragraph 4 of said petition, said defendants admit that they have a picket — about and around the premises operated by the plaintiff in its warehouse, cold storage and ice business in Kansas City, and that their

manner in so doing and their right to do so is guaranteed by the First and Fourteenth Amendments to the Constitution of the United States, and by Paragraphs 8 and 29 of Article I of the Constitution of the State of Missouri. Said defendants are insufficiently informed to plead to the other allegations in said Paragraph 4.

7. Said defendants deny each and every allegation in the 5th paragraph of plaintiff's petition.

8. Said defendants deny each and every allegation in the 6th paragraph of plaintiff's petition.

9. Said defendants, answering the 7th paragraph of plaintiff's petition state that they are not sufficiently informed as to the allegations therein to plead the same.

[fol. 12] 10. Said defendants state to the Court that plaintiff's said petition fails to state facts sufficient to constitute a cause of action against them, or any of them, and fails to state facts sufficient to entitle plaintiff to the relief prayed for in said petition.

Wherefore, said defendants pray that the restraining order issued be dissolved, and that the said petition be dismissed.

[File endorsement omitted.]

IN CIRCUIT COURT OF JACKSON COUNTY

AMENDED MOTION TO DISSOLVE—Filed July 19, 1946

1. Come now the defendants, Joseph Giboney, Harold Hackell, Paul Mandalia, Sam Ippolito, Harry Weston, Walter Downey, Roy Uttinger, James Pike, Terrill Henry and A. J. Jenkins, leave of court having been had and obtained, and file this, their amended motion to dissolve.

[fol. 13] 2. Said defendants state to the court that each of said defendants is a citizen and resident of the United States.

3. Said defendants move the court to dissolve the restraining order heretofore issued herein for the reason that the petition of plaintiff, heretofore filed herein, does not state facts sufficient to state a cause of action against the plain-

tiff to the said restraining order; or to any other relief prayed for therein; and that said restraining order is a violation of the rights of said defendants as guaranteed by the First and Fourteenth Amendments to the Constitution of the United States, and by Paragraphs 8 and 29 of Article I, of the Constitution of the State of Missouri.

[File endorsement omitted.]

IN CIRCUIT COURT OF JACKSON COUNTY

ORDER OVERRULING MOTION TO DISSOLVE

Thereafter, on Monday, July 29, 1946, Defendants' motion to dissolve restraining order heretofore issued herein, was by the court taken up, duly heard and considered and by the court overruled, to which action and ruling of the court the defendants, and each of them duly excepted.

It was thereupon, by the court, further ordered and adjudged that this cause be continued until August 8, 1946, for further hearing on the temporary injunction and demerits.

IN CIRCUIT COURT OF JACKSON COUNTY

ABSTRACT OF RECORD ENTRIES

This cause came on for trial on Thursday, August the 8th [fol. 14] the same being the — day of the regular May, 1946, Term of the Circuit Court of Jackson County, Missouri, at Kansas City, before the Honorable Thomas J. Seehorn, judge of said court, and resulted on the — day of August, 1946, the same being the — day of the regular May Term, 1946, of said court in a decree for plaintiff as hereinafter set out.

And afterwards, to wit, on the — day of —, 1946, and within the time theretofore allowed by the court, the Defendants presented to said court their transcript of the record on appeal, which on said day was allowed, signed and sealed by the court, ordered filed and made a part of the record, which said Defendant's transcript of record on appeal so signed and so filed, as follows:

IN CIRCUIT COURT OF JACKSON COUNTY

Defendants' Transcript of Record on Appeal to the Supreme Court

Be It Remembered, That on Thursday, August 8, 1946 the same being the — day of the regular May, 1946, Term, of the said court, the above entitled and numbered cause coming on regularly for trial before the Honorable Thomas J. Seehorn, Judge of said court.

The Plaintiff appeared by its attorney, Mr. Guy B. Park, Esquire.

The Defendants appeared by their attorney, Mr. Cliff Langsdale, Esquire.

Whereupon, the following proceedings were had and entered of record:

[fol. 15]

PLAINTIFF'S CASE

Whereupon, the Plaintiff to sustain the issues in its behalf, offered testimony, oral and documentary, and made admissions as follows, to-wit:

Mr. Park: Your honor, please, the briefs and statements that have been submitted to you, I think, fully cover the issues and will begin by the introduction of testimony without bothering you with statements.

Mr. Langsdale: Now, as I understand it, we are trying this case on the merits, that is on the final order, permanent injunction.

Mr. Park: Really, there was a temporary restraining order issued and the matter comes up for hearing as to whether a temporary injunction had been issued. However, I have no objection to—

Mr. Langsdale: (Interrupting) What is the use of taking two bites at it, I am willing to let this be the final trial.

The Court: I understood that is what this was.

Mr. Park: I have no objection to that at all. There will probably have to be some corrections in the record to conform to that.

Mr. Langsdale: Well, the order can be made now that this hearing is on the permanent injunction.

[fol. 16] Mr. Park: I agree. Is that correct?

Mr. Langsdale: Yes.

The Court: You may proceed, gentlemen.

W. RALPH WILKERSON, the plaintiff, being produced, sworn and examined as a witness on the part of the plaintiff, testified as follows:

Direct examination.

By Mr. Park:

Q. Mr. Wilkerson, give your name to the court?

A. W. Ralph Wilkerson.

Q. And you are the President of the Empire Storage and Ice Company, the plaintiff in this case?

A. Yes, sir.

Q. And how long have you been associated with the Empire Storage and Ice Company?

A. Since its inception and incorporation of the Company in May, 1920.

Q. And where is the plant located?

A. It is located, the mailing address is 2722 Guinotte Avenue. It comprises eight and half acres with various building- thereon.

Q. The number of Buildings, please?

A. There are about 7 buildings.

Q. What is the principle business of the company?

A. Storage and warehousing is the primary portion of our business. Cold storage, warehousing various kinds of [fol. 17] merchandise, and manufacture of and sale of ice. We also operate a grain elevator, a public grain elevator.

Q. Now, will you give the court some idea as to the volume of your business, the extent of it?

A. Well, at the present time, I would say that we have in our warehouses under extremely cold temperatures approximately four and half million pounds of perishable products consisting of butter, various kinds of meat, poultry, frozen eggs, frozen fruits and vegetables. Those are the principle products in the freezer, in the coolers. We have approximately, probably four and half or five million pounds, primarily consisting of shell eggs; approximately eleven hundred thirty thousand cases consisting of three million nine hundred thousand eggs. Those eggs are in the shell. We have quite a number of cars of celery, oranges, lemons, various other products that are stored by various parties here, locally, as well as companies in various parts of the United States stored in transit at our plant.

Q. You do both intra- and interstate warehouse business?

A. That is correct.

Q. And your local customers you do the warehouse business with—you have no interest in the products that are left there, they are left there for him, as I understand it?

A. Our company has no interest in the products whatsoever. They are all stored by various owners at various locations.

[fol. 18] Q. And at the expiration of their storage time, or when they want to withdraw them, how is that done, when the owners want their goods?

A. The owner issues an order for us to deliver to their driver the commodity that he may be calling for that is in the warehouse.

Q. That applies to local?

A. That applies to local as well as products in interstate. Also, we have products in the warehouse for the Army Market Center, Quartermaster Department that moves in by truck and moves out by truck, as well as a great many other perishable products that are in the warehouse for national accounts, like Borden's Dairy, Franklin Ice Cream Company, etc. I would say that 85 percent of these four million eggs in the shell that are in the warehouse belong to customers stored in transit from out of town customers in various states, and approximately the other 15 percent belong to local dealers in Kansas City or Kansas City, Kansas.

Q. The merchants on the market are your customers?

A. A large number of the merchants here, locally on the market, are customers of our company and have perishable products stored therein.

Q. You also mentioned that you can manufacture and sell ice?

A. Yes, sir, that is part of our business.

[fol. 19] Q. And the only article that you manufacture and sell is ice?

A. That is correct.

Q. And to whom do you sell ice?

A. We sell ice to the local dealers here in town that are individual contractors owning their own truck. Dealers that have been buying from our company for approximately 20 years. We also sell in carload to the railroads and we sell to some local dealers on the market for ice that they use in icing their perishable products.

Q. Your sales are exclusively wholesale, as I understand it?

A. That is correct.

Q. You sell at wholesale?

A. That is correct.

Q. And by the way, is your plant a closed shop, unionized?

A. Yes, it is unionized by two different unions.

Q. What are the two unions?

A. C.I.O.—

Mr. Langsdale: (Interrupting) Just a minute. I object to the question. The answer is not responsive to the question, at least, part of the question which was, "is your shop a closed shop". His answer was, "that it was unionized". There are a number of different unionizations of shops that are not closed shops; such as maintenance of membership—

Mr. Park: (Interrupting) I withdraw that question. I am not acquainted with the technicalities of the closed shop.

[fol. 20] By Mr. Park:

Q. Are your employees, except executive employees, union men?

A. Except executives and office employees, otherwise they are all union men.

Q. And what two unions?

A. The American Federation of Labor and the Industrial Congress, commonly known as the C.I.O.

The Court: What department is non-union?

A. The office workers and executive employees.

Q. Now, have you a signed contract with the different unions?

A. Yes.

Q. The C.I.O. and the A.F. of L.?

A. We have.

Q. Have you any labor trouble in your plant?

A. No, sir, we have not.

Q. Is there any strike?

A. No, sir, there is not.

Q. Are there any matters of dissension in your plant as between the management and the laborers?

Mr. Langsdale: Just a minute. You mean by that those who work in the plant?

Mr. Park: Those who work in the plant.

A. There is not.

Q. Now, do many of your customers who bring produce to your place for storage and take it from your place after [fol. 21] storage employ union labor?

A. Yes. It is hard to say exactly but I would estimate that of the merchandise stored in our warehouses by local customers, as well as out of state customers, known as stored in transit, that that comes in and out of our plant by drivers that belong to unions, and the product that comes in and out of our plant by transfer truck and local truck, that possibly 85 percent of them are unionized.

Q. That is to say the drivers for your customers are about 85 percent union men?

A. Yes, that is an estimate. I would have no way of knowing accurately.

Q. Now, just prior to the bringing of this injunction suit, did you have any conversation with the president, or acting president, of the defendant members of the defendant union?

A. Yes, I had a conversation with the president of that union.

Q. What is his name?

A. Mr. Jenkins.

Q. What was the first conversation you had with him?

A. He called me up—

Mr. Langsdale: (Interrupting) Wait a minute. Would you mind fixing a time?

Mr. Park: Fix a time.

A. I couldn't recall the exact date.

Q. Just approximately?

[fol. 22] A. I would say approximately 30 or 40 days before this picket line was established at our plant.

Q. Well, now, what was the conversation you had with him?

A. He called me up and said he wanted to talk to me about a matter that would be helpful to him, if I could do so. I told him that that would depend on what he had in mind whether I could or couldn't. He said that I had a number of dealers, contractors, peddlers or whatever you want to call them, that were buying from our ice company

that did not belong to his union, and asked me if I wouldn't cooperate with him by refusing to sell ice to those dealers unless they had an A.F. of L. card or belonged to his union. I told him, after deliberating, that I couldn't consistently do that, that I was hired as a manager of that company to retain business and not drive it away. It would be inconsistent for the manager of the company to do that. Those dealers can buy ice at other plants. They are not compelled to buy from our plant. They did not want to belong to the union and if I took that stand, I felt as though it would be driving business away from the company, and my board of directors, later in talking this over with them, approved of my stand in refusing to do that.

Q. None of these that you are speaking of, the president of this organization that you are speaking of, are employees of yours.

[fol. 23] A. That is correct. None of them are employees of our company.

Q. Are any of the people that you sell ice to employees of your company?

A. No, sir, they are not.

Q. Well, what are they?

A. You are speaking of the ones that buy ice?

Q. The ones that buy ice.

A. Well, they are individual contractors on their own truck or trucks, hire their own men to work for them and deliver their ice to various parts of the city or to dealers. They buy that ice at our plant wholesale and deliver it to various parts of the city and sell at retail.

Q. Do you have anything to do—

Mr. Langsdale: (Interrupting) Just a minute. I wish to ask that part of the answer that describes these people as "individual contractors" be stricken out as a conclusion of law.

The Court: Overruled. Go ahead.

Q. Has your company anything to do; either by contract with these men or otherwise, with the price for which they sell ice, or have you any control over the ice after it is sold?

A. We do not have any control whatsoever as to what they sell their ice for.

Q. In other words, they buy it from you, sell it to whom they please, and at what price they please?

[fol. 24] A. That is correct.

Q. Like you buy a suit or anything else, you have nothing to do with the selling price, is that correct?

A. Yes.

Q. Now, did you later have a talk with—what is the name of that man?

A. Mr. Jenkins.

Q. Did you later have a talk with Mr. Jenkins in regard to this ice matter?

A. Yes, I did, and had some telephone calls with some other parties that he had talked to, and information given—

Mr. Langsdale: Object to anything that was said by any other party that called him up. Hearsay evidence.

Mr. Park: Confine yourself to what Mr. Jenkin's said.

A. The other conversation I had with Mr. Jenkins direct was the morning after they established the picket line at our plant.

Q. Who was in company with him?

A. A business agent for another A.F. of L. truck drivers' union. A good many of his members are employees of the Local produce dealers here in Kansas City.

Q. Any of them employees of yours?

A. No, sir.

Q. What was said in that conversation between Mr. Jenkins and the business agent of this other branch of the A.F. of L.?

Mr. Langsdale: Does he know the name of the business agent?

[fol. 25] By Mr. Park:

Q. Do you know the name?

A. I am sorry, I can't recall his name, Mr. Langsdale.

Mr. Langsdale: Do you know what other union he was talking for?

The Witness: A. F. of L.

Mr. Langsdale: Truck drivers' union?

The Witness: It is a union that accepts the truck drivers that serve the local produce market here at Kansas City. You probably know his name yourself. I can't recall it, but he and Mr. Jenkins came into my private office and talked to me relative to this to see if they couldn't induce me at

that time to agree not to sell ice to these contractors that did not belong to his union—that is Mr. Jenkin's union.

Mr. Langsdale: I again object to the use of the word "contractors". There is a legal conclusion. He means these peddlers.

The Witness: No, I mean the contractors.

Mr. Langsdale: I want the court to know that I am objecting to the word "contractors" as a legal conclusion. Not that I think it means anything different, it is purely a legal conclusion. We call them peddlers and we—

The Witness (Interrupting): In answering that question, I mentioned in the original that these men were contractors, dealers or peddlers, whatever term you want to apply to [fol. 26] them.

By Mr. Park:

Q. Back again to your first conversation with Mr. Jenkins, the one you had over the telephone, what did he say to you would be done by his union, if anything, if you didn't comply with his request?

A. If I didn't accede to his request that he would have to use other means at his disposal to force our company to come around to his point of view, and not sell ice to these men that had been buying ice from our company for a long period of years. I told him I had no control over those men, they could buy ice where they saw fit, there were other places in the city where they could buy ice. If I took that stand, I would be driving business away from the company and it would be inconsistent.

Q. Did he make any threat of picketing at that time?

A. Yes, sir, that was the threat he gave me over the telephone, that that would happen, and later, information that I received from different sources—

Mr. Park (Interrupting): Don't say that.

A. (Continuing:) That was the threat I had from him direct.

Mr. Langsdale: That he would take other means at his disposal?

The Witness: Yes.

By Mr. Park:

Q. Now, in this next conversation that you relate on the day the pickets were placed down there, what was the conversation then in your office?

A. With Mr. Jenkins and this other business agent?

Q. Yes.

A. Well, they thought it would be the smart thing for me as manager of the company to accede to their demands and, if I didn't, they would have to continue this picketing and the inference was——

Mr. Park (Interrupting): Now don't——

A. (Interrupting continuing:) If this picket line was continued they very well knew that it would ruin the company's business. I told him that I was going to endeavor to get an injunction to prevent that, that we had no control over this, that there was no trouble within our organization at all and, as a matter of fact, the men that handle this ice at the plant are C. I. O. and not A. F. L., and complications might enter into it if I did attempt to do that.

Q. Now did you tell them what effect—what effect did the picketing have on your receipt and delivery of goods for storage?

A. Well, it just virtually clamped down on the business that we were doing other than the ice that happened to be purchased by non-union contractors, dealers, or peddlers.

Q. Well now, explain to the court what happened when the picket line was established?

A. Well, when the picket line was established at our plant, [fol. 28] any number of dealers on the market automatically, their drivers coming to our plant to pickup perishable goods, such as eggs or celery or apples, their drivers would not go through this picket line and the managers of those concerns stated that their drivers would be fined and they would just simply refuse to go through the picket line. Certain ones came down and had to turn around and go back, and our office called a number of the dealers on the market and told them that this picket line was established at the plant and, to save them embarrassment or trouble, they just, a number of them, didn't send their drivers down, but they told me they could not, of course, permit that to continue, they would have to have this perishable produce out of the plant, and there were others who wanted to bring their produce in.

It would just ruin the company financially if the picket line was maintained there.

Q. What you mean is that the members of any branch of the A. F. of L. would refuse to cross the picket line as long as the picket line was there, is that correct?

A. That is correct.

Q. For that reason, you couldn't deliver your goods to your customers or receive goods from your customers?

A. That is correct.

Q. Did you say anything to Mr. Jenkins about that?

A. Yes, I imagine I did. I don't recall verbatim word for [fol. 29] word conversation with him but I would say that I did.

Q. Your best recollection?

A. Yes.

Q. And what was his attitude when you explained to him that it was hurting your business, aside from your ice business?

A. Well, his conversation was to the effect that he was going to get all of these men that handled ice in the city in his union, and he was going to use every effort within his command to accomplish that purpose.

Q. Was he down there during this picketing?

A. Yes, sir.

Q. Did he know that the A. F. of L. drivers refused to come in and leave your place?

A. Yes, sir.

Q. He is the business agent for this association, is he not?

A. Yes, as far as I know he is.

Q. That is what he represents himself to be?

A. I believe that is correct.

Q. Acting president?

A. I believe so.

Q. Now, have you any tenants in your place of business?

Mr. Langsdale: Any what?

Mr. Park: Tenants.

A. Yes, sir, we have several tenants.

Q. Now, which is the largest of your tenants?

Mr. Langsdale: Just a minute. I object to that for the reason there is nothing competent that makes that material [fol. 30] to the issues in this case that he has any tenants.

The Court: Proceed.

Mr. Park: Your honor,——

The Court (Interrupting): Proceed.

By the witness:

A. We have a tenant on our premises, John J. Meyer, who does a volume of business in excess of several million dollars a year, that deliver sugar. Then they handle exclusively the Del Monte brand of canned goods and flour, and they distribute and sell these products to all of the various grocers in Kansas City and Kansas City, Kansas, and immediate points within a radius of probably 40 miles of Kansas City.

Mr. Langsdale: Object to that answer and ask that it be stricken out. The answer is not based upon any allegation in the petition and immaterial to any of the issues pleaded.

The Court: Overruled. Proceed.

A. (Continuing:) This tenant has drivers belonging to an A. F. of L. Union and if this picket line was continued they, of course, would not be permitted to have access in and out of our premises.

Mr. Langsdale: Object to that as immaterial and not based upon any pleadings, and for the further reason that it is the conclusion of this witness. It is not based upon any facts and for the further reason it isn't the truth. The only picketing done down there is for this ice company.

[fol. 31]. The Court: Do I understand, the entire plant was picketed?

The Witness: That is correct. They had a picket in front of our main entrance in which all trucks egress have in and out, and no union driver would cross that picket line. As you probably know, they would be fined if they did.

The Court: Proceed.

Mr. Langsdale: Now, if the court please, it still isn't pleaded and it isn't a fact. You mean to say that the drivers of this so-called tenant didn't cross that picket line?

The Witness: That is not what I said.

Mr. Langsdale: That is what I imply——

The Witness (Interrupting): I said if this picket line continued they would——

Mr. Langsdale: But when the picket line was on those drivers went through the line didn't they?

The Witness: They did not go through. They were delayed that day before the drivers of that union gave them permission to go through that day—

Mr. Langsdale (Interrupting): I move that be stricken out as bound to be hearsay. You can see what we are getting into when he attempts to testify to something that isn't pleaded. Of course, it isn't a fact that any other persons doing business in this building would not go over this picket [fol. 32] line. You would find them in here if that were true.

Mr. Park: If your honor please, we will have before this case is over a member of that firm, an employee of that firm, who will state the full facts as to whether their men do go in or go out.

• The Court: Overruled.

By Mr. Park:

Q. These men are tenants of yours, they pay you rent don't they?

A. Yes, sir.

Q. And the rent is considerable?

A. Yes, sir.

Q. You supply them with quarters where goods are stored and kept?

A. That is right.

Q. And kept?

A. That is correct.

Q. And it is part of your warehouse business?

A. Yes, sir.

Q. And one source of great revenue to the company?

Mr. Langsdale: Just a minute. I object to the leading and suggestive conclusions that are asked in these questions. I take it that these people rent their space and run their own business, do they not?

The Witness: I don't run their business for them.

Mr. Langsdale: You don't do anything but rent them space and collect rent?

The Witness: They pay a set price on the—

Mr. Langsdale (Interrupting): You rent space to them. [fol. 33] The Witness: Provided they can do business they—

Mr. Langsdale (Interrupting): And you have nothing to do with running their business?

The Witness: No, I am not running their business.

By Mr. Park:

Q. Now, what effect will delay in shipping perishable goods have upon, for instance, fruits and goods of that sort brought to you for storage? What is the result if they cannot be placed in your warehouse?

A. If they cannot be placed in the warehouse, they would naturally deteriorate and be an entire loss to the operator or dealer.

Mr. Langsdale: Or go to some other warehouse?

The Witness: If they could get in some other warehouse.

By Mr. Park:

Q. Do you have government produced goods?

A. Yes, sir.

Q. Have you government goods in storage now?

A. Yes, sir.

Q. What proportion of the annual business from the standpoint of bulk revenue does the ice bear to the entire business, the wholesaling of ice?

A. Well, that portion of the business, of the ice that is affected by this is only a small portion of our business. I would say the portion directly affected in the ice end of it is 15 to 20 per cent of our total business.

[fol. 34] Mr. Langsdale: You mean of your total ice business or total business?

Mr. Park: He said ice was 15 per cent of his total business.

The Witness: I meant that the ice business affected by this picket line amounts to 15 per cent of our total volume of business. The other 85 or 80 per cent is warehousing other than ice.

Mr. Park:

Q. You started to make a suggestion to me.

A. Your spoke about one tenant. I said we had several tenants.

Q. Now, the other tenants.

A. The other tenants are the Kansas City Dressed Beef Company, The Royal Meat Company, who are likewise affected by having union drivers that could not come in and out of the plant with the picket line established there,—

Mr. Langsdale (Interrupting:) Object to that as a conclusion of the witness and not based upon any statement of fact or any pleading. I assure the court that it is not the intention of this union to interfere with the drivers of any tenant, anyone else there, except this man's business in selling ice to these peddlers and drivers who are affected, who do business with the Empire Storage Company but not with any of the tenants, and when he makes that statement, it is a conclusion and ought to be stricken out on that account. It is bound to be hearsay.

[fol. 35] The Court: Hadn't you notified him that they could remove goods for a single day and not thereafter?

Mr. Langsdale: Well, that is what he says, but I say that is not based upon the pleading. He says that somebody notified him that he could remove goods for a single day. It is hearsay and a conclusion of this witness.

The Court: Overruled.

Mr. Park: I want to make this suggestion while the point is before you. Mr. Langsdale, the attorney on the other side, is claiming all the time that all this picketing affects is the sale of ice and the delivery of ice. The testimony of Mr. Wilkerson is that the union drivers from the customers on the market came in there and wouldn't cross that picket line.

Mr. Langsdale (Interrupting:) And when he said those that came in to do business with the plaintiff herein, I made no objection, but when he reaches out and states a conclusion, that it affects other businesses down there that have space in the building, that is not based on any pleading and it is a conclusion.

The Court: Overruled. Proceed.

By Mr. Park:

Q. Could you name, to the court, some of the men on the market who attempted to deliver goods and to take goods from your plant while the picket line was being established there and before the temporary injunction was issued, name some of them?

[fol. 36] Mr. Langsdale: Object to that because it is calling for hearsay testimony.

Mr. Park: If he knows.

The Court: Let him answer.

A. I personally know by having talked to the owners of these businesses on the market that their drivers would not cross that picket line. That is common knowledge, Mr. Langsdale, as you know, they won't cross a picket line.

Mr. Langsdale: So long as you confine your testimony to these people who do business with the plaintiff, I am sitting here without any objection.

Mr. Park: That is all I am asking him about, these men who wouldn't deliver goods to him.

The Court: Go ahead.

By the Witness:

A. The Monarch Egg Corporation. Their truck was down there to get products out of the warehouse and he was turned down and could not get across and went back.

Mr. Langsdale: Just a minute. I object to that language "that he was turned down and could not get across and went back". You mean he would not go in?

The Witness: I don't know what happened. I know he had to go back. I wasn't there at the time he couldn't get in—

[fol. 37] Mr. Langsdale: Then I object to the whole testimony as hearsay.

The Court: Overruled.

Mr. Langsdale: When you say the man came back and add to that he was turned down and had to go back, when you admit you weren't there and don't know anything about it, then I object to that as hearsay and, furthermore, it is a conclusion.

Mr. Park: Maybe we can simplify this. From what you said you agreed to this; that some of the A. E. of L. drivers for some of the customers of the plaintiff would not and did not cross the picket line because it was against the union rules—

Mr. Langsdale (Interrupting:) If you want to state that into the record I won't make any objection to it. I am not going to admit anything. There is no objection, the same as if it were testified to by the witness.

Mr. Park: I thought may be you would agree to that and save some time.

The Court: Proceed.

Mr. Langsdale: Of course, it is just plain A, B, C, that the purpose of the picket is to keep other A. F. of L. members, and those who are driving trucks for A. F. of L. unions not to cross the picket line, and I presume that purpose was carried out. Now, is that sufficient?

[fol. 38] The Court: Proceed.

By Mr. Park:

Q. Now, the volume of business interrupted in that manner amounted to what?

A. You mean the proportion of the business of the company that was affected by reason of this picket line being there?

Q: Yes.

A. About 85% of the company's business.

Q. Outside of the ice business, what per cent?

A. Well, I would say about 80%.

Q. Now, the financial effect on the company was and will continue to be what?

A. Well, the company couldn't exist and continue to operate with the picket line there with the firms that we do business with, because 88 or 85 per cent of the people we do business with in the warehousing end have union drivers, either C.I.O. or A. F. of L.; that applies to local as well as to out of town business that we do.

Mr. Langsdale: You don't mean to imply that the C.I.O. drivers are affected by this picket line?

The Witness: I can't answer that. From my personal knowledge, I don't know, Mr. Langsdale.

Mr. Langsdale: Your own drivers are C.I.O.?

The Witness: Yes, sir.

Mr. Langsdale: He goes back and forth?

[fol. 39] The Witness: He did that day, yes.

By Mr. Park:

Q. Now, I want to ask you again, I think I have covered it but I am not certain, have you any contract or agreement or relationship with these men to whom you sell ice other than the manufacturer and sale to customers?

A. I don't believe I understand your question.

Q. Have you any agreement or understanding or relationship with the customers to whom you sell ice other than as seller and purchaser?

A. We have contracts to sell ice to certain dealers, contractors, and we have a contract with the Artic Ice Company and by reason of that picket line being established there that day, he could not enter the premises and get his ice.

Q. You mean his union drivers couldn't?

A. His union drivers would not come into the plant and get their ice. They wouldn't cross that picket line and we have a contract with that man to sell him so many tons of ice during certain months of the year, and these are the months of the year during which he is supposed to get that ice.

Mr. Park: I believe that is all at this time.

Cross-examination.

By Mr. Langsdale:

Q. Mr. Jenkins had a number of telephone conversations with you prior to the time the picket line was placed around your plant, did he not?

[fol. 40] A. I beg your pardon?

Q. Mr. Jenkins had a number of telephone conversations with you prior to the time the picket line was placed around your plant?

A. I wouldn't say a number of conversations.

Q. He had more than one?

A. He had one that I distinctly recall but I don't recall of another conversation. There was several indirect conversations.

Q. And did he tell you in that conversation that the very large majority of peddlers selling ice in Kansas City were members of the union?

A. He may have. I couldn't say. I don't recall.

Q. And did he tell you that you were the only manufacturer of ice that would sell ice to a non-union peddler.

A. If he did, it is not correct.

Q. Well, the Kansas City Ice Company is the largest manufacturer of ice in this community, is it not?

A. Yes, but not the only manufacturer.

Q. But it does more than the majority of the ice business, does it not?

A. Possibly so, yes.

Q. And you knew that the Kansas City Ice Company would not sell ice to any peddler who was not a member of the Union?

Mr. Park: Objected to as immaterial and not tending to prove or disprove any facts in this case.

[fol. 41] The Court: Let him answer.

A. (By the witness) I know nothing about this business whatsoever.

Q. Now, you answer this question. You know, or have learned, that the Kansas City Ice Company sells ice to no peddler who doesn't have a union card?

A. I haven't been advised to that effect, no.

Q: You haven't been advised to that effect by anybody?

A. Mr. Jenkins told me they wouldn't. I don't know it to be a fact.

Q. You haven't any reason to believe that is not a fact?

A. I have common knowledge that they have sold ice to men that are not members of that union.

Q. Common knowledge. What kind of common knowledge is it you have?

A. By the ones that have said they have bought ice there, not as a general practice, but they filled in and bought a cake or so to fill in on their route.

Q. Isn't it the general practice of the Kansas City Ice Company not to sell ice to any non-union peddler?

A. That is what Mr. Jenkins tells me.

Q. Do you know any other manufacturer of ice that sells ice to any non-union peddlers but yourself?

A. Yes, sir.

[fol. 42] Q. Which one?

A. Federal Cold Storage.

Q. Where is the Federal Cold Storage?

A. It is about a five minute ride across the state line.

Q. Over in Kansas?

A. Yes, sir.

Q. Is there any other manufacturer of ice in Kansas City, Missouri, that sells ice to a non-union peddler, except you?

A. I have men who have bought ice from other plants in Kansas City that don't belong to the A. F. of L.

Q. Do you know of any plant that makes it a practice to sell ice to non-union peddlers, except yourself, in Kansas City, Missouri? —

A. I don't know what their practice is. I know that I have bought ice from other peddlers in Kansas City.

Q. How do you know they don't belong to the union?

A. They have told me that.

Q. How do you know about your Federal ice?

A. I —

Q. (Interrupting:) You don't know anything about this —

Mr. Park (Interrupting): Object to him lecturing the witness.

Q. (Continuing:) Federal Cold Storage selling ice to non-union peddlers, do you? Tell the court how you got your information about the Federal?

A. Well, the Federal does the warehousing business the same as we do.

[fol. 43] Q. Now, did Mr. Jenkins tell you that he wanted to get all the peddlers in the union, so as to keep up the wage structure of the people doing this kind of business?

A. I don't recall any words of that kind, no.

Q. Did he tell you that in substance?

A. No.

Q. Did he tell you that he wanted to see that the helpers who worked for these peddlers got a fair wage?

A. I had no conversation of that kind with him at all. That was none of my affair.

Q. Didn't you learn that these non-union peddlers had helpers that they were paying starvation wages?

A. I wouldn't know anything about that.

Q. Did you know these non-union peddlers were paying a minimum wage of \$4.00 a day for helpers?

A. I know nothing of that at all.

Q. Did Mr. Jenkins tell you that the objective of getting these men in the union was to keep up the wage structure?

A. I don't recall any conversation of that kind.

Q. You say he didn't tell you that?

A. I said I didn't recall any conversation of that kind.

Q. How many of these peddlers buy ice at the plaintiff's place of business?

A. I suppose we have probably 20 who buy ice from our [fol. 44] company directly and indirectly.

Q. Well, how many of them go down to have their trucks loaded?

A. With ice?

The Court: I don't understand the question.

Q. How many of these peddlers go down to the plant to have their trucks loaded with ice at the plant?

A. Oh, I would say approximately about 12 or 15.

Q. And it was those 12 or 15 that Mr. Jenkins wanted to get into the union?

A. Possibly so.

Q. Did he tell you that there are two hundred peddlers in town and that all the rest of them belong to the union?

A. No, I had no conversation of that kind with him at all.

Q. You knew that if these 12 or 15 peddlers would join the union that the picketing would be stopped, didn't you?

A. I didn't know it but I would assume that if that happened it would be, yes.

Q. That was the purpose of picketing, either to get them in the union or not to have you sell to them?

A. I would assume that would be the purpose of it.

Q. Now, was it so all of this obstruction of your business that you have described could have been stopped by either these men joining the union or you not selling to them, that is correct, isn't it?

[fol. 45] A. Maybe so, I don't know.

Q. Well, that is your judgment isn't it? That was the object of the picketing, wasn't it?

A. Yes, I would assume that was the object of the picketing.

Q. How was the picketing done—by banner?

A. Yes, they had a banner out there. The banner wasn't correctly worded though.

Q. What did the banner say?

A. Well, the banner didn't even have the proper name of our company.

Q. What did it say?

A. It had an erroneous name on the banner.

Q. What did it say?

A. I don't recall the exact wording, Mr. Langsdale.

Q. You said it was erroneous?

A. I remember that particularly because I know the name of our company, and he didn't have the name of our company properly on the banner.

Q. Well, what did he have on the banner?

A. Empire Coal and—Empire Coal Company.

Q. And what did it say?

A. I don't recall the exact wording.

Q. Don't you know what the banner said they were objecting to? It just didn't say "Empire Coal Company" and quit, did it?

[fol. 46] A. I think it said "Unfair to Local—," I don't know the number.

Q. You know it didn't have the "unfair" on it?

A. No, I don't know that because I said I didn't remember the exact wording of it.

Q. You saw it didn't you?

A. Yes. I didn't take a copy of it.

Q. Now, isn't it true that the banner said, "Empire"—whatever it said—"Cold Storage Company sells ice to non-union peddlers"?

A. Yes, I think, it had something to that effect.

Q. And that was the picketing that was done, wasn't it, by one man carrying a banner?

A. That is correct.

Mr. Langsdale: That is all.

Mr. Park: That is all.

(Witness excused.)

LAWRENCE TUSO, being produced, sworn and examined as a witness on behalf of the plaintiff, testified as follows:

Direct examination.

By Mr. Park:

Q. State your name to the court please.

A. Lawrence Tusso.

[fol. 47] Q. Do you buy ice from the Empire Cold Storage and Ice Company, the plaintiff in this case?

A. Yes, sir.

Q. How long have you been buying ice from that plant?

A. 23 years.

Q. Explain how you buy it and what you do with it?

A. I buy and sell it to the public.

Q. How do you buy it?

A. I buy so many tons every morning.

Q. Pay for it?

A. Pay for it.

Q. Have you any understanding with the Empire Storage Company as to what you will do with that ice and who you will sell it to?

A. No, sir.

Q. You are an independent buyer?

A. That is right.

Q. And they manufacture the ice and sell it at wholesale?

A. That is right.

Q. You retail it?

A. That is right.

Q. Have you any helpers?

A. I got two sons been helping me.

Q. How long have they been helping you?

A. Since one of them got out of school and one of them got out of the navy about two months ago.

Q. They live with you?

A. Yes, sir.

[fol. 48] Q. And that is the way you and your family make a living?

A. That is right, that is the way I raised six kids.

Q. Did you ever belong to this union?

A. I belonged when it was first organized.

Q. You are not a member of that union now?

A. No, that was 8 years ago.

} Mr. Park: That is all, I believe.

Mr. Langsdale: No questions.

(Witness excused.)

W. RALPH WILKERSON, recalled as a witness on the part of the plaintiff, having been previously duly sworn, testified further as follows:

Redirect examination.

By Mr. Park:

Q. You spoke of some other tenants you had. Do they employ A. F. of L. employees?

A. It is my understanding that they have.

Mr. Langsdale: You mean all the tenants?

By Mr. Park:

Q. Any of your tenants?

A. Yes. We have two other tenants; we have three other tenants other than the one I spoke of.

Q. Name them, please?

A. F. Angelo, U. S. Royal Meat Company, and the Kansas City Dressed Beef and Fish Company.

[fol. 49] Q. Do you know whether any of them employ drivers who are affiliated with the A. F. of L.?

A. It is my impression that each one of them have A. F. of L. drivers.

Q. Well, those drivers, did they transport things back and forth while the picket line was being maintained?

A. No, they didn't attempt to come into the plant because they knew the picket line was there.

Mr. Langsdale: Just a minute. I object to that—

Mr. Park: (Interrupting) I think that could be stricken out.

By Mr. Park:

Q. Did they come in and out the plant while the picket line was there?

A. I couldn't be positive whether they did or not. There were quite a number of drivers that came down there and turned around and went back, when they saw the picket line established. I didn't have somebody out there to check and get the names of those drivers that were turned back or, of their own volition, turned around and went back when they saw the picket line.

Mr. Langsdale: You don't know whether any of those drivers were drivers of these tenants or not?

The Witness: I have been told they were.

Mr. Langsdale: You don't know, do you?

The Witness: Not my personal knowledge, no.

[fol. 50] Mr. Park: We have a witness from the plant who is on his way up here now, a man whose truck was actually turned back.

Mr. Langsdale: You mean it turned around and went back. We will admit that if that is all you want to prove.

Mr. Park: And wouldn't go through the line to deliver or receive goods as long as the picket line was there.

Mr. Langsdale: We will admit that.

Mr. Park: I believe that is all then, your honor.

Whereupon, the plaintiff rested its case.

Mr. Langsdale: Is that your lawsuit? I want to state an oral demurrer for the record. The defendants, Joseph Giboney, Harold Hackell, Paul Mandalia, Sam Ippolito, Harry Weston, Walter Downey, Roy Uttinger, James Pike, Terrill Henry, and A. J. Jenkins, demur at the end of the plaintiff's case for the reason that no evidence has been offered to show that the plaintiff is entitled to the relief prayed for in its petition or to any relief under the petition, and for the further reason that the petition itself states no facts sufficient to entitle the plaintiff to the relief prayed for herein.

The Court: Overruled.

(To which ruling and action of the court, the defendants, by their counsel, at the time duly excepted and still excepts.)

Mr. Park: It is possible, your honor, that a merchant or a produce dealer, Mr. Helm, will be here immediately [fol. 51] after lunch and we would to put him on to prove

Mr. Langsdale (Interrupting): If you will tell me what he will testify to, I will admit it.

Mr. Park: I'd rather the court would hear his testimony.

Mr. Langsdale: Can you give us some indication as to what he will testify to, may be I won't want to go ahead until you-r-through.

Mr. Park: Well, he will testify to the amount of business he does with the company, and that his driver belongs to the A. F. of L. and that the driver refused to cross the picket line to deliver his goods. I want to show the extent of his business and that it has nothing to do with the ice business whatever.

Mr. Langsdale: I'll admit all that and let you state the extent of his business, any knowledge of whatever you want to state.

Mr. Park: I wouldn't want to state because I don't know, not having talked to the witness. I wouldn't want to put into the record that I can prove a certain thing by a witness if I know I can prove it by the witness.

Mr. Langsdale: I'll admit any amount you want to say together with the other facts you say this witness will testify to. What is the use of bringing the judge back and

[fol. 52] anybody else to hear what one witness will testify, if it can be admitted?

Mr. Park: You won't get through with this witness in one minute.

Mr. Langsdale: I'll get through with him in about five minutes.

DEFENDANT'S CASE

ALBERT J. JENKINS, being produced, sworn and examined as a witness on behalf of the defendant, testified as follows:

Direct examination.

By Mr. Langsdale;

Q. State your name?

A. Albert J. Jenkins.

Q. Where do you live?

A. 5241 Swope Parkway.

Q. What do you do.

A. President and business representative of the Ice, Coal and Soft Drink Employees.

Q. That is a labor union?

A. Yes; A. F. of L.

Q. And how many members have you?

A. We have approximately 758.

Q. Is your association affiliated with the truck drivers of Kansas City?

A. Yes, we are affiliated with them, Teamsters Joint Council, No. 56.

Q. How many different locals affiliated with that council?

[fol. 53] A. Approximately 18.

Q. How many members of the labor union's truck drivers are affiliated with the Kansas City joint council, approximately?

A. Well, I would say approximately about between 15 and 20 thousand.

Q. Those are the ones that operate in and out of Kansas City?

A. Yes.

Q. Where is the Council's office?

A. 116 West Linwood.

Q. Is that where the office of your local is?

A. Yes.

Q. These various unions are those who have drivers for different kinds of business?

A. That is correct.

Q. The jurisdiction of your union includes those who sell ice?

A. That is right.

Q. Drive and deliver ice?

A. That is right.

Q. What else does your jurisdiction include?

A. I have the cold storage employees, soft drink drivers, soft drink workers, and coal drivers. The charter reads "ice, cold storage, coal, and soft drinks."

Q. Have you all the soft drink establishments in Kansas City among the drivers?

A. All of them, yes.

Q. Including Coca Cola?

A. Yes, sir.

Q. And all of them?

[fol. 54] A. All the soft drinks as drivers, yes, sir.

Q. Now, what ice companies do you have members working for?

A. With all the City Ice.

Q. City Ice Company?

A. City Ice Company, Kansas City Ice Company, City Ice and Fuel, Midwest.

Q. Who is the largest manufacturer of ice in Kansas City?

A. The City Ice Company.

Q. Do they manufacture more than all the rest put together?

A. I wouldn't want to state definitely more than all the rest put together, but right close to it, a fair estimate that they do.

Q. Do members of your union work for the company?

A. Yes, sir.

Q. Does that company sell to non-union peddlers?

A. Not to my knowledge.

Q. Do they have an agreement with you that they won't?

A. That is right.

Q. What other companies in this city refuse to sell to non-union peddlers?

A. City Ice and Fuel, Superior Ice Company, we have that too, that is one I left out.

Q. The one that he named in Kansas City, Kansas, is not union?

A. I couldn't answer, I don't have any members there.

[fol. 55] Q. You don't have any members over there?

A. No.

Q. The people who buy ice, as do these people who have been described by Mr. Wilkerson, are called "peddlers" in the industry, are they not?

A. That is what they have always been called, ever since I have been in it, since 1930.

Q. Are they eligible for membership in your union?

A. Yes, sir.

Q. How many of the peddlers of that class of ice sellers are there in Kansas City, Missouri, if you know?

A. Approximately 200, I would say.

Q. How many of them belong to your union?

A. About 80, between 75 and 85 per cent of them.

Q. Do you establish a minimum wage for the helpers of those peddlers?

A. We do.

Q. What is the minimum wage?

A. \$4.00 a day.

Q. And do those helpers belong to your union?

A. Yes, sir.

Q. Was it your desire, when you talked to Mr. Wilkerson, to have the peddlers who buy at his plant and who don't belong to the union join the union?

A. Yes, sir.

Q. And did you tell him that?

A. Yes, sir.

Q. And is that for the purpose of maintaining your wage [fol. 56] standard?

A. That is correct.

Q. Some of these peddlers pay much less than \$4.00 a day?

A. That is right.

Mr. Park: Ask him, don't tell him.

By Mr. Langsdale:

Q. What did you have on the banner that was used in front of the plaintiff's place of business?

A. Well, the wording of the plant, I believe, it was misspelled, that I can't recall exactly. The other wording was that they sold ice to non-union peddlers.

Q. What did you say did that?

A. Empire, Empire Coal and Empire Ice and Storage.

Empire Cold Storage is what we intended, but I think it said coal.

Q. You mean the Empire Ice and Cold Storage Company?

A. That is right.

Q. And it was "cold" that was misspelled?

A. I believe they put it "coal."

Q. At any rate, the banner was carried near the entrance to the plant of the Empire Storage and Ice Company?

A. That is correct. I would say probably between 15 and 25 feet in front of the main entrance.

Mr. Langsdale: That is all.

Cross-examination.

By Mr. Park:

Q. The purpose of this organization, the members of [fol. 57] which are the defendants in this case, is to force all buyers of ice to join your union?

A. I would say all the independent peddlers.

Q. Anybody that buys and sells ice?

A. For resale, I would put it that way.

Q. For resale, you are trying to force them to join your union?

A. I don't.—

Mr. Langsdale (Interrupting): Object to the use of the word "foree."

By Mr. Park:

A. Compel them or persuade them to join your union?

A. I would say persuade.

Q. And you are not trying to get the wholesalers of ice to join your union, are you?

A. I don't understand your question, what you mean by wholesalers,—

Q. (Interrupting): A man who manufactures and sells at wholesale?

A. I have them in all the plants with the exception of three in Kansas City.

Mr. Langsdale: You mean the production employees?

Mr. Park:

Q. I am not talking about the employees, I am talking about the owners of the plant.

A. I am not interfering with the owners of the plant, they couldn't belong.

[fol. 58] Q. Mr. Wilkerson, could he belong?

A. No, sir.

Q. He couldn't belong, no official could belong?

A. No, sir, he could not.

Q. Now, what are you trying to get him to do? He can't join your union, what is it you are attempting to do?

A. Merely attempting to organize the unorganized pedestrian.

Q. Well, why are you boycotting Mr. Wilkerson?

A. Because—

Mr. Langsdale: Just a minute. I object to the use of "boycotting."

Mr. Park: Well that is what you are doing, isn't it?

Mr. Langsdale: That is a legal term and legal conclusion. It is picketing. They are in front of his plant.

By Mr. Park:

A. Don't you know, Mr. Jenkins, as the head of that organization which is an affiliate of the A. F. of L., don't you know that all A. F. of L. drivers or union members are instructed not to do business at that plant as long as there is a picket line there?

A. I don't know anything about what the other drivers are instructed to do.

Q. Isn't that the rule of your organization, not to cross a picket line?

A. It is commonly known that the average driver will not cross any picket line.

Q. Isn't it a rule of your organization?

[fol. 59] A. I would say it is a rule of all organizations.

Q. And the violation of that rule would subject the member to a penalty of some sort, isn't that a fact?

A. Fine or suspension.

Q. Fine or suspension?

A. Yes.

Q. So, you knew when you placed the pickets there that customers of the Empire Cold Storage and Ice Company couldn't deliver their product there for storage?

Mr. Langsdale: Just a minute. We object to that question as beyond the scope of this inquiry.

The Court: Overruled.

By Mr. Park:

Q. You knew the effect that would have, the customer that had A. F. of L. drivers couldn't get his goods taken into or removed from that plant?

A. I wouldn't say that I knew he couldn't. I knew it was customary that the average driver would not cross the picket line.

Q. That is the reason you picketed the company, to keep your A. F. of L. men from going in there and coming out?

A. That is right.

Q. That was your purpose in picketing that place. You knew it interfered with his business, didn't you?

A. I don't know anything about his business, but that was [fol. 60] my intention.

Q. You didn't care anything about his business?

Mr. Langsdale: Object to that as immaterial.

The Court: Let him answer.

By Mr. Park:

Q. You didn't care about the effect it had on his business, you would picket it anyhow regardless of the effect it had upon the business?

A. I would say yes.

Q. That is the very purpose behind the picketing, to coerce the Empire Storage Company into getting members for your union, helping you in getting membership for your union?

Mr. Langsdale: Object to that as calling for a conclusion of the witness.

The Court: Let him answer.

Mr. Langsdale: It is not based on any fact in this case. The picketing was for the purpose of keeping him from selling to nonunion members.

By Mr. Park:

Q. Isn't it a fact that you went to Mr. Wilkerson personally and told him that if he didn't refuse to sell to non-

union peddlers you would picket the place and interfere with his business?

A. I said nothing with regard to interfering with his business. I told him that if he didn't quit selling to independent peddlers, I would place a picket.

[fol. 61] Q. You knew the effect that placing a picket there would be to interfere with his business?

A. I had no knowledge of what it would do to his business.

Q. But you had an idea, didn't you?

A. I would say I did.

Q. That he would be compelled not to sell to non-union members or to get these non-union members to join your union in order for him to carry on his warehouse business, you knew that didn't you?

A. That is right.

Q. That is what you are down there for?

A. I don't know as I understand your question.

Q. Well, may be I can get it a little clearer. You said to Mr. Wilkerson that you were going to put a picket there, and you knew at the time you told him that, that it would interfere with the warehouse business, didn't you?

A. I was within hopes it would.

Q. That was your purpose in putting the picket there, wasn't it?

A. No, my purpose in putting the picket there was to keep him from selling to the non-union peddler.

Q. But you knew what the effect would be on his business?

A. I didn't exactly know.

Q. You had a pretty good idea?

A. I had some idea.

Q. A pretty good idea. That always follows, doesn't it?

[fol. 62] A. Customarily:

Q. And you knew that, and you went with an associate officer of another local union to Mr. Wilkerson and tried to persuade him to get these men he was selling ice to, to join your union, didn't you?

A. Yes, I was with another official of another local union.

Q. And your purpose was to get him to induce these men he was selling ice to to join the union?

A. Not to sell to the non-union peddlers.

Q. Not to sell. But you suggested that if he would tell them to join the union it would be all right?

A. That was up to me if they joined the union or not.

Q. Well, you have been solicitng them to join the union, haven't you?

A. No, sir, I haven't solicited no union in this city, not in Greater Kansas City.

Q. To join your union?

A. Not at the time the ice——

Q. (Interrupting) Don't you want them to join your union?

A. Yes, sir.

Q. Why don't you go to them and solicit them instead of trying to destroy the business of the manufacturer?

A. I am not doing anything so long as I have an injunction against him.

Q. I know you are not now, but you were before you had the injunction?

A. Yes, sir.

[fol. 63] Q. And that was the understanding the members of the union had who were partners to this suit?

A. I couldn't say whether they do or not. My members do.

Q. But those who were members understand the purpose of it?

A. Yes, sir.

Q. And the affiliates of the A. F. of L. understand the purpose of it?

A. Certainly.

Q. And are cooperating with you. Your ultimate purpose was to destroy the business of the Empire Storage and Ice Company unless they quit selling to non-union men?

A. I would say I didn't mean anything in regards to destroying their business at all. My sole purpose was to organize those non-union peddlers.

Q. Haven't you solicited any of them?

A. Not since this injunction. I have in the past.

Q. While the picketing was going on, didn't you personally solicit?

A. No, sir.

Q. Before the injunction?

A. Yes.

Q. You were down there with the picket, weren't you?

A. Yes, sir.

Q. And you were on the inside of the place talking to the union men?

A. No, I was inside Mr. Wilkerson's office talking to Mr. Wilkerson is the only time I was inside.

Q. John Meyer, a tenant of the plaintiff company, as [fol. 64] A.F. of L. employees, hasn't he?

A. I understand he has.

Q. Did you have a talk to Mr. Meyer about his employees?

A. No, sir.

Q. Who is the other business agent that was down there?

A. There were several of them down there.

Q. Several of them?

A. Yes, sir.

Q. About how many of the business agents were there while the picketing was going on before the injunction?

A. There was approximately five or six, I would say. I don't recall exactly how many. They were going and coming at various times.

Q. What are the duties of the president of an organization of this sort?

A. Duties of the president?

Q. Yes.

A. Mostly, just to conduct meetings.

Q. But you are also the business agent?

A. That is right.

Q. And you have direction of the men and they obey you as to where they should work and where they should go?

A. That is correct.

Q. You were down there assisting in the picketing, were you not?

A. Yes, sir.

Q. And directing members of the union not to deliver to or receive goods from the company?

A. I don't know what you mean by "directing." I was [fol. 65] there to see that the banner was carried.

Q. That wasn't the only thing you were there for?

A. That is right, the only thing, to see the banner was carried.

Q. And that was what you went into Mr. Wilkerson's office for?

A. No, sir.

Q. What did you go in for?

A. I went in—the other representative thought that he would go inside and talk to him, and we went in and I don't think I said anything to Mr. Wilkerson about it that morning.

Q. You had talked to him on the telephone?

A. Yes, sir.

Q. And told him if he didn't do it, you were going to place pickets there and interfere with his business?

A. I said nothing about interfering with his business.

Q. You knew it would interfere with his business?

A. I thought perhaps it would.

Q. That is what you meant by calling him up and telling him he had better cooperate with you and not sell to non-union men, that is what you had in mind?

A. I had in mind for him to quit selling to non-union peddlers.

Q. Now, there are about 12 or 15 of these men you call peddlers that buy ice from the company?

A. I think there are about 25 all told. Mr. Wilkerson said 12 or 15 that loads out of that plant, but there is a place up on top of the hill on Prospect which is controlled [fol. 66] and operated by Mr. Wilkerson.

Q. Take this man who was on the stand just before you got on, by whom is he employed?

A. I presume himself.

Q. Now, who are the employees of the men who buy ice from Mr. Wilkerson?

A. Who are—

Q. Who are they working for?

A. Some of them, I don't know all of them, are working for Mr. Dunham, some of these men's names, all of these men's names were in this petition.

Q. But they belong to the union?

A. Yes, sir.

Q. I am talking about the independents that you are trying to get to join the union, who are they employed by?

A. They are employed by the man who is buying the ice, some of them, and some of them are working for themselves.

Q. I mean these men that Mr. Wilkerson sells to that are not union men?

A. They are employed by themselves.

Q. Employed by themselves. Not working for anybody except themselves?

A. That is right.

Q. Would you have any objection to Mr. Wilkerson selling ice to a restaurant under your rules?

A. I don't just understand what you mean there. Would I have any objection to him if he was driving a truck and delivered ice, yes, does that answer your question?

Q. Yes, that answers the question.

A. Yes, I would.

[fol. 67] Q. Who employs these non-union men that you are trying to force Mr. Wilkerson to help you get into the union?

Mr. Langsdale: Object to that as repetition. He says they worked for themselves.

The Court: Overruled.

By Mr. Park:

Q. They are not employees of anybody?

A. Not to my knowledge.

Q. Now, if you get one of them to join the union, what benefit would it be to that man who is not employed by anybody to sell his ice for any more?

Mr. Langsdale: Object to that as immaterial. Doesn't tend to prove or disprove any issues in this case. Certainly, we don't in this case try out the benefits of union organization.

The Court: Overruled.

By Mr. Park:

Q. Here is a man who is the owner, if he joined the union he would have to pay dues wouldn't he?

A. Yes.

Q. What are the dues he would have to pay?

A. \$2.50 a month.

Q. What is *in* initiation fee?

A. That depends. We have various initiation fees. If we take them in groups, we make concessions; if we take them after their place is organized, there is a \$25.00 initiation fee.

Q. And then, dues of how much a month?

A. \$2.50.

[fol. 68] Q. Now, what benefit is it to a man who buys ice and sells it to belong to the union?

Mr. Langsdale: Object to that as immaterial. It doesn't—

Q. (Interrupting) What can you do for them?

Mr. Langsdale: Just a minute. Object to the question. It is not based on any pleading and certainly this court will

take judicial knowledge of the fact that there is a benefit in belonging to labor unions.

Mr. Park: I don't mean the moral benefit.

The Court: Overruled.

By Mr. Park:

Q. What I mean is, can he sell ice for any more?

A. I wouldn't say he could sell for any more. I didn't have any control of what they sell for.

Q. So, as I understand it, if he joins the union, he can't get any more for his ice than if he did not join the union?

A. I don't have anything to do with fixing the price of ice. He can sell it for any amount he wants to. I don't have anything to do with it. He can give it away if he wants to.

Q. Can he do that if he is a member of the Union?

A. He can give it away. I have nothing to do with that at all.

Mr. Langsdale: If he is a member of the union, he can [fol. 69] take part in keeping up the wages of these helpers?

The Witness: That is correct.

Mr. Langsdale: To see they get living wages and not starvation wages?

The Witness: That is correct.

Mr. Langsdale: And he can buy his ice from the City Ice Company, Kansas City Ice Company and these other places that refuse to sell to non-union peddlers?

The Witness: That is correct.

By Mr. Park:

Q. Do all non-union peddlers have helpers?

A. I couldn't answer that, but I would say that during the peak season there would be 90 to 95 per cent would have helpers.

Q. How about the man who doesn't have a helper, that buys in small quantities, and sells around from house to house?

A. Truthfully, I don't think you will find anyone on the street today who doesn't have a kid helping them on an ice truck.

Q. Their own children?

A. No, not all of them.

Q. Some of them?

A. It is possible. . . .

Q. Give employment to their families that way?

A. Yes.

Mr. Park: I believe that is all.

Mr. Langsdale: That is all.

(Witness excused).

Mr. Park: Now, your honor, it is noon and—

[fol. 70] Mr. Langsdale: (Interrupting) The defendant rests.

Whereupon, the defendant rested its case.

Mr. Park: Well, we want to reserve the right to put another witness on.

Mr. Langsdale: I will admit anything you say in testimony.

Mr. Park: I don't care. I want to put the witness on.

The Court: You will be here at two o'clock.

Mr. Park: I don't want to inconvenience the court.

The Court: It doesn't interfere with the court. Be here at 2 o'clock gentlemen. You are now excused until 2 o'clock.

Whereupon, the Court stood at recess until 2 o'clock p.m. of said Thursday, August 8, 1948.

[fol. 71] Afternoon Session, Thursday, August 8, 1946.

Pursuant to adjournment as aforesaid, at 2 o'clock p. m. of said Thursday, August 8, 1946, Court met, present and presiding as before, and the trial continued as follows:

Mr. Park: The witness will not be here, your honor. He is a man of advanced years and his health is not good and he is afraid to come out in this heat, but there will be no dispute as to his testimony.

Mr. Langsdale: We offered to admit it this morning.

Mr. Park: Well, you were coming back anyway.

Mr. Langsdale: No, but we will admit it now if you will state it.

Mr. Park: Another matter I would like to read into the record is a list which Mr. Wilkerson has made of some of the firms that do business with his company, have union drivers, and whose business with them was interrupted.

Mr. Langsdale: Well, I will admit that those people had business with him, they had union drivers and their busi-

ness in all probability would have been interrupted, but I am not going to admit something that they can't testify to.

Mr. Park: This is the list of names.

Mr. Langsdale: Well, you can read these into the record.

Mr. Park: Mr. Wilkerson, you will have to read them [fol. 72] into the record.

Mr. Wilkerson: The Quartermaster Market, United States Government, which is the army, Campbell Soup Company—

Mr. Langsdale: Wait a minute. They have their own drivers have they not? I am not going to admit that unless you prove it.

Mr. Park: Withdraw that—

Mr. Wilkerson (Interrupting:) Just about three days back, they sent a transport truck down there to get butter out of our warehouse to go across to Kansas.

Mr. Langsdale: Who did, the Quartermaster?

Mr. Wilkerson: Yes.

Mr. Langsdale: What is it you expect to prove?

Mr. Wilkerson: I just want to put into the record the names of the larger accounts that have perishable goods in our plants bringing it in and taking it out, that can't operate in or out of our plant as long as the picket line is there.

Mr. Langsdale: I am going to object to your conclusion if you state as to the army. That isn't true. It is the rule and regulation of the truckdrivers in this community never to interfere with any truck going after or for government material. You will have to prove that by some other witness. I won't admit that. I will admit the private concerns.

Mr. Wilkerson: Campbell Soup Company who operate [fol. 73] a packing house, slaughter house in Kansas City, Kansas, constantly bringing fresh meat into our plant, as much as 100,000 pounds a day; the Liberty Truck Line Transfer Company, they have union drivers, they can't come into the plant and won't come in so long as the picket line is there; Wilson and Company, Borden's Dairy Company, Franklin Ice Cream Company, Country Club Dairy, Fred Wolfman, Incorporated; Carter Pie Company, Continental Packing Company, Milgram Food Stores, Incorporated; Loose-Wiles Biscuit Company, Bell Packing Company, Frigid Food Products Company, W. R. Perry, Los Angeles, California, Royal Meat Company, F. Angelo, and Kansas City Dressed Beef; those are just some of the companies.

W. RALPH WILKERSON, recalled as a witness on the part of the plaintiff, having been previously duly sworn, testified further as follows:

Recross-examination.

By Mr. Langsdale:

Q. All of those companies employ members of some A. F. of L. trucking union?

A. Of some union, I wouldn't be positive they are A. F. of L. They might be C.I.O.

Q. You know, of course, this picket line doesn't affect C.I.O. people because they work for you and are constantly going in and out of there, aren't they, including your own driver?

A. I don't know. C.I.O. drivers have refused to pass the picket line.

[fol. 74] Mr. Langsdale: I admit this testimony only insofar as it is to the effect that the drivers for these companies are members of the A. F. of L. unions. I don't want the implication here that they are C.I.O. because they wouldn't recognize our picket line, don't have to and won't. That is all.

Redirect examination.

By Mr. Park:

Q. I want to ask you one other question. You testified about Armour and Company?

A. Contractor, yes, I testified.

Q. What I want to ask you is something you didn't testify to. Did Meyers and Company have A. F. of L. union drivers?

A. No.

Q. What company is that.

A. Ar-tie Ice Company, Mr. Dunham is the owner of it. They have union drivers.

Q. Have you a contract to sell ice to him?

A. Yes, sir.

Q. And were you able to carry out the contract while the picketing was going on?

A. No, sir.

Q. Why?

A: Because his drivers are union drivers and they won't cross that picket line and he is a contractor.

Mr. Park: That is all.

(Witness excused.)

[fol. 75] Whereupon, the plaintiff rested its case.

Mr. Langsdale: That is all.

Whereupon, the defendant rested its case.

DEFENDANTS' REQUESTED DECLARATION OF LAW

Whereupon at the close of all the testimony in the cause, the defendants, by their counsel, requested the court to give the following Declaration of Law:

"At the close of all of the evidence in the case, the Court declares the law to be that under the pleadings, the law, and the evidence, the plaintiff is not entitled to the relief prayed for in its bill, and is not entitled to the order heretofore made in this case, and plaintiff's bill is dismissed at its cost."

"Filed August 8, 1946. Bernard T. Flannery, Clerk, by: John Thrasher, Deputy."

Which said Declaration of Law, at the close of all the testimony the Court refused to give; to which ruling and action of the Court, the defendants, by their counsel, duly excepted and still except.

JUDGMENT

Whereupon, the Court, over the objection and exception of the defendants, entered the following judgment:

"Now, on this day, this cause coming on regularly for hearing on an order on the named defendants to show cause why a temporary injunction should not issue against them enjoining them from picketing plaintiff's warehouse [fol. 76] and cold storage and ice plant in Kansas City, Missouri.

Plaintiff appears by its counsel, Guy B. Park, and the named defendants appear by their counsel, Clif Langsdale.

And now, in open Court, the parties waive a hearing on a temporary injunction and agree that the Court, upon hearing the evidence, may finally determine on the merits — the issues as to whether or not a permanent injunction should issue, as prayed in plaintiff's petition.

And now, plaintiff offers its evidence and rests; and now defendants offer their evidence and rest.

And now the Court, having seen and read the pleadings, having seen and read the briefs filed by the parties, and having seen and heard the witnesses, and now being fully advised in the premises, finds as follows:

That the named defendants herein, and each of them, are members of the Ice and Coal Drivers and Handlers Local Union 953, an unincorporated labor union and association in Kansas City, Missouri; that the defendant A. J. Jenkins is the president and business agent of said local union; that the members of said local union are so numerous that it is impractical and in all probability impossible to make all the members of said local union parties to this action; that the named defendants fairly represent said local union and its entire membership and fairly insure adequate representation of all members of said local union; and the Court accordingly finds that it has full jurisdiction and authority to enter a decree and injunction herein which will be binding on all members of said local union, whether named as defendants herein or not.

[fol. 77] And the Court further finds that all the allegations of plaintiff's petition herein are true. That all the members of said local union have entered into, and were at the time of this filing of this action, and until stopped by the restraining order of this Court, engaged in an agreement, combination and understanding to picket plaintiff's warehouse, cold storage and ice plant located at Chestnut and Guinotte Streets in Kansas City, Missouri, and thereby to prevent ingress and egress thereto and therefrom and thereby interfere with the relationship between plaintiff and its customers and in unlawful restraint of the trade of plaintiff, and for the further purpose of alienating and driving away plaintiff customers.

And the Court further finds that neither the named defendants nor any other members of said local union are now, or have been, employees of the plaintiff. That it is not the purpose of said conspirators to affect the relation-

ship between plaintiff and any of its employees, but the purpose of said conspirators is to affect adversely to plaintiff the relationship between plaintiff and its customers. That there does not here exist any labor dispute within the meaning of the law between plaintiff and its employees, or between plaintiff and any member of said local union, and that there is no labor dispute whatever involved. That said conspiracy is for an unlawful purpose, and that picketing used to carry out said purpose is also unlawful.

[fol. 78] And the Court further finds that at the time of the institution of this suit, and until stopped by the restraining order of this Court, the members of said local union were engaged in picketing plaintiff's said plant. That unless an injunction issues herein, the members of said local union will continue to picket plaintiff's said plant. That the picketing of plaintiff's said plant has resulted, and if permitted to continue will result in the drivers of many of plaintiff's customers refusing to pass said picket line and enter plaintiff's said premises, either to bring goods thereto or take goods therefrom. That by reason thereof delays in delivery of perishable goods and other goods have resulted in great loss and damage to plaintiff and plaintiff's customers.

That because of said picketing many of plaintiff's customers have ceased to do business with plaintiff, and if said picketing is permitted to continue, many more of plaintiff's customers will, in the future, cease to do business with plaintiff. That it is impossible now to ascertain how much money and business the plaintiff has lost by reason of said picketing, and plaintiff's damages are impossible of ascertainment. That if such picketing is permitted to continue, it will be impossible to ascertain plaintiff's damage in the future. That by reason thereof plaintiff has suffered, and if said picketing is continued, will suffer great and irreparable damages as a direct result thereof. That plaintiff is without any adequate remedy at law.

[fol. 79] The Court further finds that plaintiff is entitled to the issue of permanent injunction against all members of said local labor union as prayed in Plaintiff's petition.

It is thereof ordered, adjudged and decreed that the named defendants and all other members of the Ice and Coal Drivers and Handlers Local Union No. 953, an unincorporated labor union and association in Kansas City,

Missouri, be, and they are hereby permanently enjoined for the reasons aforesaid from placing pickets, or picketing, around and about the buildings of plaintiff described above, and used by plaintiff in the cold storage, warehouse and ice business in Kansas City, Missouri, and the costs of this action are assessed against the named defendants, for which let execution issue. (Entry Furnished.)"

IN CIRCUIT COURT OF JACKSON COUNTY

DEFENDANTS' MOTION FOR A NEW TRIAL—Filed August 9, 1946

[fol. 80] Now come the defendants herein and respectfully move the Court to set aside the judgment entry heretofore herein entered in favor of the plaintiff, and to grant defendants a new trial on the following grounds, to-wit:

1. The Court erred in refusing to give defendants requested declaration of law at the close of all the evidence in the case to the effect that under the pleadings, the law and the evidence, the plaintiff is not entitled to the relief prayed for in the Bill.

2. The Court erred as a matter of law in finding, under the evidence of the case, that there was no labor dispute within the meaning of the law involved in the case.

3. For the reason that said judgment is not supported or legally justified by any substantial evidence in the case; that is to say that even viewing the evidence in the light most favorable to the plaintiff there is no legal basis for a judgment in favor of the plaintiff.

4. This being an equity case the judgment is against the great weight of the evidence and constitutes an abuse of judicial discretion subject to review by the Appellate Court.

5. The Court erred in denying to the defendants the protection afforded them by virtue of the First and Fourteenth Amendments to the Constitution of the United States, and by paragraphs 8 and 29 of Article 4 of the Constitution of [fol. 81] the State of Missouri, duly invoked in defendants' answer in that said judgment denies to said defendants the freedom of speech and of assembly, and deprives them of their property rights without due process of law.

6. The Court erred in finding that the conduct of the defendants constituted an unlawful restraint of trade under the Missouri Statutes as pleaded in Plaintiff's petition:

7. The Court erred in entering a judgment for the plaintiff whereas said judgment under the law and undisputed facts in the case should have been in favor of defendants:

[File endorsement omitted]

IN CIRCUIT COURT OF JACKSON COUNTY

ORDER OVERRULING MOTION FOR NEW TRIAL

Afterward, and on said Friday, August 9, 1946, the same being the 74th day of the regular May, 1946, Term of said court, defendants' motion for new trial was by the court, taken up, duly heard and was by the court overruled.

(To which action and ruling of the court, the defendants, and each of them, at the time duly excepted and still except.)

[fol. 82] IN CIRCUIT COURT OF JACKSON COUNTY

NOTICE OF APPEAL—Filed August 9, 1946

Now come defendants and each of them through their duly authorized attorney of record and agent, and file this notice of appeal to the Supreme Court of the State of Missouri from the final judgment and decree heretofore herein by the court made and entered.

Memorandum of the Clerk

I have this day mailed by registered mail a copy of the within notice of appeal to each of the following persons at the address stated: Guy B. Park, Esq., Attorney-at-law, 1608 Federal Reserve Bank Building, Kansas City 6, Missouri.

I have also mailed a copy of the notice of appeal to the Clerk of the Supreme Court of Missouri, together with the docket fee deposited by appellant.

Dated August 9, 1946.

Bernard T. Flannery, Circuit Clerk, by Maxine Johnston, Deputy Clerk. (Seal.)

Attached to said notice of appeal is "return receipt of the United States Post Office Department, dated August 12, 1946, 5:30 p. m., addressed to B. T. Flannery, Circuit Clerk, [fol. 83] 306 County Court House, Kansas City, 6, Missouri, signed for Guy B. Park; by Alma L. Campbell."

Whereupon, said defendants' appeal bond was by the court fixed in the appeal sum of \$100.00, and said defendants were by the court given twenty (20) days from this date within which time to file said appeal bond, and said defendants were by the court given time to file their Transcript of the Record on Appeal as fixed by law.

Wherefore, the defendants, by their counsel, pray the Court to settle and allow this, their Transcript of Record on Appeal, to all and singular the acts, rulings and orders of the Court in the premises; and that the same be signed, sealed, allowed and made a part of the record herein.

Wherefore, the plaintiff and defendants, agreed that the foregoing is a full and complete Transcript of the Record on Appeal in this cause, including exceptions to all and singular acts, rulings and orders of the Court in the premises.

Guy B. Park, Attorney for Plaintiff; Clif Langsdale,
Attorney for Defendants.

[fol. 84] ORDER SETTLING TRANSCRIPT OF RECORD

Now, Therefore, the Court, being fully advised in the premises, doth find the foregoing to be a correct Transcript of the Record on Appeal taken and saved on behalf of the Defendants, Joseph Giboney, Harold Hackell, Paul Mandalia, Sam Ippolito, Harry Weston, Walter Downey, Roy Uttinger, James Pike, Terrill Henry and A. J. Jenkins, herein, and doth now sign the same and doth order that the same may be filed and made a part of the record in this cause.

Given under the hand of the Judge of said Court before whom said proceedings were had, on this 10th day of September, 1946.

Thomas J. Seehorn, Judge of the Circuit Court,
Jackson County, Missouri, Division Number Three.

[fols. 85-86] Clerks' Certificates to foregoing transcript omitted in printing.

[fol. 87]

[File endorsement omitted.]

IN THE SUPREME COURT OF MISSOURI

Sitting En Banc

No. 40,699

EMPIRE STORAGE AND ICE COMPANY, a Corporation, Appellee,

v.

JOSEPH GIBONEY, HAROLD HACKELL, PAUL MANDALIA, SAM IPPOLITO, Harry Weston, Walter Downey, Roy Uttinger, James P. McC. Terrill Henry, A. J. Jenkins, Individually and as President of the Ice and Coal Drivers and Handlers Local Union No. 953, an Unincorporated Labor Union, Appellants

PRAECIPE FOR TRANSCRIPT OF RECORD—Filed July 8, 1948

To the Honorable the Clerk of the Supreme Court of the State of Missouri:

You are requested properly to certify the following matters and things of record in the above entitled cause for filing with the Clerk of the Supreme Court of the United States, upon appeal taken from the Supreme Court of Missouri, to said Court.

1. This Precipe.
2. The Transcript of Record of the proceedings in the lower court, filed in the Supreme Court.
3. Argument and submission of above entitled cause to the Supreme Court, Division 1.
4. The decision and judgment of the Supreme Court, Division 1, affirming the judgment of the lower court, with opinion filed.

Note: The opinion by Division No. 1 of the Supreme Court is literally the same as the opinion later delivered by the Supreme Court en banc on March 8, 1948. It is suggested therefore that it is unnecessary to certify both opinions, it being sufficient if the opinion en banc is certified. We suggest the following form:

[fol. 88] The opinion by Division 1 of the Supreme Court of Missouri is literally the same as the opinion later delivered by the Supreme Court en banc, on March 8, 1948, copy of which is hereinafter certified.

5. Filing of motion for rehearing in Division 1 and also filing of motion to transfer said cause to the Court en banc.

6. Action of the Court in overruling the motion for a rehearing and in sustaining the motion to transfer the cause to the Court en banc.

7. Submission of the cause by the parties to the Court en banc.

8. Judgment and decision by the Supreme Court en banc, including certified copy of the opinion by that court then filed.

9. Filing by appellants of motion for a rehearing upon the judgment and opinion of the court en banc.

10. Action by the court en banc in overruling said motion for a rehearing.

11. The court's action in sustaining appellants' motion to stay the mandate for ninety days from April 12, 1948.

12. Petition for appeal to the Supreme Court of the United States, with record entry of filing.

13. Appellants' Bond on Appeal and the approval, with record entry of filing.

14. Appellants' assignments of error.

15. Appellants' general statement.

16. Appellants' jurisdictional statement.

17. Citation.

18. Order allowing appeal.

Clif Langsdale, Clyde Taylor, Attorneys for Appellants, 922 Scarritt Building, Kansas City, Missouri.

[fol. 89] UNITED STATES OF AMERICA,
State of Missouri, ss:

Be it Remembered, that, heretofore, to-wit, on the 10th day of October 1946, there was filed in the office of the Clerk of the Supreme Court of the State of Missouri, in a cause entitled Empire Storage and Ice Company, a corporation, Respondent, versus Joseph Giboney et al., Appellants, No. 40099, a transcript of record.

[fol. 90] IN SUPREME COURT OF MISSOURI

[Title omitted]

ARGUMENT AND SUBMISSION—April 23, 1947

Come now the parties, by their respective attorneys, and after arguments herein submit the above-entitled cause to the Court.

IN SUPREME COURT OF MISSOURI

40099

EMPIRE STORAGE AND ICE COMPANY, a Corporation,
Respondent

vs.

JOSEPH GIBONEY, HAROLD HACKELL, PAUL MANDALIA, SAM IPPOLITO, Harry Weston, Walter Downey, Roy Uttinger, James Pike, Terrill Henry, A. J. Jenkins, Individually, and as President of the Ice and Coal Drivers and Handlers Local Union, No. 953, Appellants

Appeal from the Circuit Court of Jackson County

JUDGMENT—September 8, 1947

Now at this day come again the parties aforesaid, by their respective attorneys, and the Court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of Jackson County rendered, be in all things affirmed, and stand in full force

and effect; and that the said respondent recover against the said appellants its costs and charges herein expended and have therefor execution. (Opinion filed)

(This opinion by Division One is literally the same as the opinion later delivered by the Court en banc on March 8, 1948 and is shown on Page 93 of this transcript)

[fol. 91]

IN SUPREME COURT OF MISSOURI

[Title omitted]

MINUTE ENTRY—September 22, 1947

Come now the appellants, by attorney, and file their motion for a rehearing in the above entitled cause, with service shown.

Come also the appellants, by attorney, and file a motion to transfer said cause to the Court en banc, with service shown.

IN SUPREME COURT OF MISSOURI

[Title omitted]

ORDER OVERRULING MOTION FOR REHEARING AND SUSTAINING
MOTION TO TRANSFER TO COURT EN BANC—October 13, 1947

Now at this day, the Court having seen and fully considered the motion of the appellants for a rehearing in the above-entitled cause doth order that said motion be, and the same is hereby overruled.

And now at this day, the Court having seen and fully considered the motion of the appellants to transfer this cause to the Court en Banc, doth order that said motion be, and the same is hereby sustained, and said cause is ordered transferred to the Court en Banc.

[fol. 92] IN SUPREME COURT OF MISSOURI

En Banc

SUBMISSION—February 2, 1948

Come now the parties, by their respective attorneys, and submit this cause to the court on briefs.

IN SUPREME COURT OF MISSOURI

En Banc

40099

EMPIRE STORAGE AND ICE COMPANY, a Corporation,
Respondent

vs.

JOSEPH GIBONEY, HAROLD HACKELL, PAUL MANDALIA, SAM IPPOLITO, Harry Weston, Walter Downey, Roy Uttinger, James Pike, Terrill Henry, A. J. Jenkins, Individually, and as President of the Ice and Coal Drivers and Handlers Local Union No. 953; Appellants

Appeal from the Circuit Court of Jackson County

JUDGMENT—March 8, 1948

Now at this day come again the parties aforesaid, by their respective attorneys, and the Court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of Jackson County rendered, be in all things affirmed, and stand in full force and effect; and that the said respondent recover against the said appellants its costs and charges herein expended and have therefor execution. (Opinion filed)

Which opinion by the Court en banc is in words and figures following, to-wit:

[fol. 93] IN THE SUPREME COURT OF MISSOURI

En Banc

January Session, 1948

No. 40,099*

EMPIRE STORAGE AND ICE COMPANY, a Corporation,
Respondent,

v.

JOSEPH GIBONEY, HAROLD HACKELL, PAUL MANDALIA, SAM
IPPOLITO, Harry Weston, Walter Downey, Roy Uttinger,
James Pike, Terrill Henry, A. J. Jenkins, Individually,
and as President of the Ice and Coal Drivers and Hand-
lers Local Union No. 953, Appellants

Appeal from the Circuit Court of Jackson County

OPINION

Plaintiff corporation maintains a cold storage public warehouse where it stores perishable foodstuffs and other perishable merchandise owned by its customers. It also manufactures and sells ice which constitutes from fifteen to twenty per cent of its entire business. Plaintiff's employees are completely unionized by both the C. I. O. and the A. F. of L. The ice which it sells is a union product, not a non-union product. There is no labor dispute of any kind between plaintiff and its employees.

Defendants are members and officers of a labor union, the Ice and Coal Drivers and Handlers Local Union No. 953, which is affiliated with the American Federation of Labor. Its membership is composed of truck drivers for soft drink manufacturers, ice, and coal dealers. The membership also includes individual ice peddlers who operate their own trucks in carrying on their own businesses of selling ice at retail. About eighty per cent of the two hundred ice peddlers doing business in Kansas City are members of the union. The defendants engaged upon a campaign for the [fol. 94] purpose of unionizing the remainder. One of the reasons was to establish a minimum wage of \$4.00 per day for any helper who may be employed by a peddler. The union has obtained agreements from all the other manu-

facturers and distributors of ice in Kansas City under which they are bound not to sell ice to non-union peddlers.

For over twenty years plaintiff has been selling ice at wholesale to individual ice peddlers. The ice peddlers are not employees of plaintiff and never have been. There is no evidence that plaintiff has ever engaged in distributing ice to customers at retail. Sales of ice to peddlers are completed at plaintiff's plant at wholesale rates. Thereafter the peddlers resell the ice at retail to their own customers without being subject to any supervision or control by plaintiff. So far as plaintiff is concerned the peddlers are independent contractors. Only twelve to fifteen peddlers are regular customers of plaintiff.

Defendant Jenkins, President of the Local Union, demanded that plaintiff stop selling ice to non-union peddlers, under the threat he would use means at his disposal to enforce his demand. Plaintiff refused his demand and a picket line was placed at its plant with the result that all deliveries to and from the plant by union drivers were halted. Drivers hauling perishable foodstuffs to plaintiff's plant could not deliver them for storage, and tenants of the storage house could not obtain their foodstuffs stored there. There was no violence. About eighty-five per cent of the plaintiff's storage business was stopped by the picket line. Defendants insist the only purpose of the picket line was to compel plaintiff to stop selling ice to non-union peddlers, and to obtain such result they had to interfere with plaintiff's business.

Plaintiff brought suit to restrain the picketing on the ground it was pursuant to an unlawful combination in restraint of trade to prevent plaintiff from carrying on its business including the sale of ice, and therefore the picketing was unlawful. Defendants answered they had the right to picket under the freedom of speech provisions of the [§1.95] Federal and State Constitutions.

After a hearing the trial court found defendants were unlawfully conspiring in restraint of trade, the picketing was for an unlawful purpose, and there was no labor dispute between plaintiff and its employees or between plaintiff and defendants. The court permanently enjoined defendants from picketing plaintiff's plant. Defendants have appealed.

Section 8301, R. S. 1939, Mo. RSA of the article of our statutes "Pools, Trusts, Conspiracies and Discriminations".

forbids a combination in restraint of trade and declares it a conspiracy, as follows:

"Any person who shall create, enter into, become a member of or participate in any pool, trust, agreement, combination, confederation or understanding with any person or persons in restraint of trade or competition in the importation, transportation, manufacture, purchase or sale of any product or commodity in this state, or any article or thing brought or sold whatsoever, shall be deemed and adjudged guilty of a conspiracy in restraint of trade, and shall be punished as provided in this article."

The court en banc has recently held this statute to apply to a situation similar to the one we have here in the case of *Rogers v. Poteet*, — Mo. —, 199 S. W. (2d) 378, and that decision is controlling here and rules this case.

In the *Rogers* case members of the Milk Drivers and Dairy Employees Local Union combined together to prevent rural milk haulers, independent contractors who were not members of the union, from delivering milk to the dairies' milk processing plants in Jackson County. The court held such combination was "a confederation in restraint of competition in the transportation of fresh fluid milk to all the milk processing plants in that area", pointing out that Section 8301 expressly forbids a combination in restraint of competition in the transportation of commodities.

On the same issues raised here as to the constitutional rights of the defendants to free speech the court said: "In [fol. 96] other words, outside of the fundamental guaranties in the Bills of Rights in the Federal and State Constitutions, the question of the legality of such combinations is one of statutory law, not constitutional law." The court held the conspiracy between the union members violated Section 8301 and the common law, and was not protected by the First and Fourteenth Amendments of the Federal Constitution, and Sections 8, 9 and 10, Article I of the Constitution of Missouri, 1945.

The instant case appears to be even a stronger case than the *Rogers* case. The plaintiff in that case was an individual hauler whom the union was trying to force into its ranks. But the plaintiff here is a business establishment which is being threatened with the alternative of either ceasing to

furnish ice to some of its customers or having its business destroyed through a local transportation combination, substantially denying delivery service to or from its plant in connection with its principal business activity which is storage, not ice selling.

Following the principal laid down in the Rogers case we must hold here that the picketing is unlawful because a combination of union truck drivers involving most of the delivery service transportation in Kansas City comes equally within the condemnation of Section 8301 when it abandons its legitimate sphere of collective bargaining and other properly related dealings with its employers, and seeks to dictate the terms under which an establishment will be either permitted or denied local transportation service.

The defendants have used their local transportation combination improperly to threaten and to produce injury and damage through a boycott of plaintiff's business, and incidentally to injure the business of citizens who are regular customers of its cold storage warehouse, by cutting off supplies to and from its customers. This misuse of their power over local transportation is all the more aggravated by the fact plaintiff's plant is fully unionized and there is no labor dispute between plaintiff and its employees, and there is no labor dispute as the term has been construed by court decisions between plaintiff and defendants, nor even any lawful labor grievance between plaintiff and defendants.

[fol. 97] The admitted purpose of defendant's picketing is clearly in violation of Section 8301. Defendant Jenkins testified his union had made agreements with the other ice companies of Kansas City under which the companies agreed not to sell ice to non-union peddlers. By their picketing defendants were attempting to force plaintiff to become a party to such combination. A combination for the purpose of refusing to sell to a certain person or persons is in direct violation of Section 8301. Our courts have so held in a number of cases. *Reisenbichler v. Marquette Cement Co.*, 241 No. 744, 108 S.W. (2d) 343; *Heim Brewing Co. v. Belinder*, 97 Mo. App. 64, 71 S.W. 691; *Finck v. Schneider Granite Co.*, 187 Mo. 244, 86 S.W. 213; *State ex rel. v. Peoples Ice Co.*, 246 Mo. 168, 151 S.W. 101; *Dietrich v. Cape Brewery & Ice Co.*, 315 Mo. 507, 268 S.W. 38.

In the latter case we said: "Argument is advanced, founded upon the right of a person engaged in a business

private in character, to buy from whomsoever he pleases, to sell to whomsoever he will, or to refuse to sell to a particular person. The right does not extend to the allowance of an agreement and concerted action thereunder of such person with others similarly engaged, in the accomplishment of a common design, to destroy the business of another, or to the making of an agreement forbidden by law, and concerted action thereunder, inflicting an injury upon the public. What the defendants could have done severally, by independent action, is essentially different from what they might do collectively, pursuant to an agreement between themselves and by concerted action thereunder. The case of *Shaltupsky v. Brown Shoe Co.*, 350 Mo. 831, 168 S.W. (2d) 1083 is not applicable under the facts or the issues.

Inasmuch as defendants were attempting through its picket line to force plaintiff into a combination which had the concerted purpose of preventing the sale of ice to non-union peddlers, and thus require it to make unlawful discrimination in its sale of ice, it follows that the purpose of the picketing was unlawful.

[fol. 98] Picketing for unlawful purposes may properly be enjoined. See *Fred Wolferman, Inc. v. Root et al.*, decided today by the court en banc, and the cases cited therein.

Defendants in this case cite the same decisions of the Supreme Court of the United States in support of their constitutional rights under which they may picket as were cited in the *Wolferman* case. We refer to that decision for the discussion of these cases and repeat here that they are distinguishable on the facts. We summarized that discussion by stating that none of such cases authorized picketing to induce an employer to do an unlawful act condemned by statute and contrary to public policy, under the constitutional guaranty of freedom of speech.

While the case of *Bakery & Pastry Drivers, etc. v. Wohl*, 315 U. S. 769 dealt with peddlers, described therein as "venders", of bakery goods it is not apposite here on the issues. The court found no unlawful conduct in that case. In an attempt to unionize the peddlers both the baking companies which supplied the peddlers and customers of the peddlers, in some instances, were picketed. No baking companies were parties to that case. The trial court found that no customers were turned away from the baking com-

panies by reason of the picketing. It also appeared that the baking companies which were then operating delivery routes through employee drivers had notified the unions that at the expiration of their contracts they would no longer employ drivers but would permit the drivers to continue to distribute their baked goods as peddlers. The state court had enjoined the picketing upon the complaint of some of the peddlers on the ground no labor dispute was involved within the meaning of the state statute. Of this the Supreme Court said: "Of course that does not follow: one need not be in a 'labor dispute' as defined by state law to express a grievance in a labor matter by publication unattended by violence, coercion or conduct otherwise unlawful or oppressive."

In *Milk Wagon Drivers Union, etc. v. Lake Valley Farm Products, Inc.*, 311 U. S. 91 the union was attempting to organize the peddlers of milk, but as we read the case the [fol. 99] picketing which was held lawful was confined to the places of business of the peddlers' customers, and the dairies which supplied the peddlers were not picketed. In that case too, the court observed that increasing use of peddlers to distribute milk caused decreased employment of union milk drivers. It also appears in *Milk Wagon Drivers Union, etc. v. Meadowmoor Dairies*, 312 U. S. 287, where picketing was enjoined because of violence, that the picketing was confined to peddlers' customers.

In *Carpenters and Joiners Union, etc. v. Ritter's Cafe*, 315 U. S. 722, the court upheld the injunction against picketing which a Texas Court had ordered on the ground the picketing constituted a violation of the state anti-trust law. However, the Supreme Court's opinion did not discuss the issue on the anti-trust law, but based its decision on the theory that a state may confine the sphere of communication by picketing to that directly related to the dispute.

The decree in this case forbidding picketing by defendants forbade only the picketing about plaintiff's premises. We affirm the decree. There is nothing in the decree which restrains defendants from informing the public of any labor dispute they may have with the peddlers by any lawful means of dissemination of information, including picketing, wherever the same may be proper. Under these circumstances we hold the decree does not contravene defendants' right of free speech under the Federal or State Constitutions.

Complaint is made that the petition failed to allege an unlawful combination in restraint of trade such as prescribed by Section 8301, and plaintiff failed to prove one. The court found after hearing evidence that defendants had combined in unlawful restraint of trade. We find the proof of such an unlawful combination was sufficient, and as shown above the combination was conceded by defendants as to the violation of the statute in attempting to prevent the sale of ice to non-union peddlers. As to the sufficiency of the [fol. 100] petition we find its allegations are somewhat general and well might have been stated in greater particularity: But defendants waived their right to compel this by timely motion. *Hamilton v. Linn*, — Mo. —, 200 S.W. (2d) 69. However, even in its general terms we find the petition sufficiently alleges an unlawful combination in restraint of trade such as Section 8301 condemns.

For the reasons stated, the judgment is *affirmed*.

James M. Douglas, Presiding Judge.

All concur.

[fol. 101] IN SUPREME COURT OF MISSOURI

[Title omitted]

MINUTE ENTRY—March 16, 1948

Come now the appellants, by attorney, and file herein their motion for a rehearing, with service, in the above entitled cause.

IN SUPREME COURT OF MISSOURI

[Title omitted]

ORDER OVERRULING MOTION FOR REHEARING—April 12, 1948

Now at this day, the Court having seen and fully considered appellants' motion for a rehearing filed in the above entitled cause, doth order that said motion be, and the same is hereby overruled.

[fol. 102] IN SUPREME COURT OF MISSOURI

[Title omitted]

ORDER STAYING MANDATE—April 20, 1948

Come now the appellants, by attorney, and file and present to the Court their motion to stay the mandate in the above entitled cause, which motion is by the Court examined and sustained; and the mandate is stayed for Ninety days from April 12th 1948.

IN SUPREME COURT OF MISSOURI

[Title omitted]

MINUTE ENTRY—July 8, 1948

Come now the appellants, by attorney, and file herein their petition for appeal, assignment of errors, Judicial Statement and Pre-cipe for transcript in the above entitled cause.

[fol. 103] [File endorsement omitted]

IN THE SUPREME COURT OF MISSOURI

Sitting En Banc

[Title omitted]

PETITION FOR APPEAL FROM THE SUPREME COURT EN BANC OF THE STATE OF MISSOURI TO THE SUPREME COURT OF THE UNITED STATES—Filed July 8, 1948

To the Chief Justice of the Supreme Court of Missouri en banc:

Joseph Giboney, Harold Hackell, Paul Mandalia, Sam Ippolito, Harry Weston, Walter Downey, Roy Uttinger, James Pike, Terrill Henry, A. J. Jenkins, individually and as President of the Ice and Coal Drivers and Handlers Local Union No. 953, an unincorporated labor union, affiliated with American Federation of Labor, your petitioners, respectfully show:

1. The petitioners are the appellants in the above entitled cause.

2. The above named appellee, Empire Storage and Ice Company, a corporation, began this suit on July 8, 1946, by filing a petition in the Circuit Court of Jackson County, Missouri, at Kansas City, praying for a temporary and upon final hearing, a final injunction against appellants, restraining and enjoining them from placing a picket or pickets around and about the buildings of appellee used in cold storage warehouse and ice business in Kansas City, Missouri.

[fol. 104] Judgment was therein rendered by the Circuit Court of Jackson County, Missouri, in favor of appellee, granting final injunction as in appellee's petition prayed.

3. An appeal from said judgment in said Circuit Court was duly taken by appellants to the Supreme Court of Missouri, which said Court, sitting en banc, was the highest court of the state in which a decision in this cause could be had. Said court of final resort did, on March 8, 1948, affirm said judgment of the Circuit Court of Jackson County, Missouri.

4. Thereafter and on March 16, 1948, appellants in due time and in accord with the rules of the Supreme Court of Missouri filed their motion for rehearing, which said motion was by the Court entertained, and on April 12, 1948, overruled. Thereupon said judgment became final, so far as Missouri jurisprudence was concerned, i.e. on April 12, 1948.

5. This petition for appeal is duly submitted and presented to the Court and the Chief Justice thereof within three months from the date on which said motion for rehearing was, as aforesaid, by the Court overruled, and the judgment became final.

6. In this suit there was and is drawn in question the validity of a statute of the State of Missouri on the ground of said statute's being repugnant to the Constitution of the United States and the decision was in favor of its validity, all as herein further specified. The statute involved is:

7. Section 8301, Revised Statutes of the State of Missouri 1939, which said section is entitled: "Pools, Trusts, Conspiracies and Discriminations," and is as follows:

"Any person who shall create, enter into, become a member of or participate in any pool, trust, agreement,

combination, confederation or understanding with any person or persons in restraint of trade or competition in the importation, transportation, manufacture, purchase or sale of any product or commodity in the state or any article or thing bought or sold, whatsoever, shall be deemed and adjudged guilty of a conspiracy in restraint of trade and shall be punished as provided in said article."

The Missouri statute referred to in Section 8301 as providing the punishment for violation thereof is Section 8305 of Revised Statute of the State of Missouri, 1939, as follows:

"Any person violating any of the provisions of this article, or who shall do any act prohibited or declared unlawful by the provisions of this article, shall be adjudged guilty of a felony, and upon conviction thereof shall be punished by imprisonment in the penitentiary not exceeding five years, or by imprisonment in the county jail not exceeding one year, or by fine of not less than five hundred dollars nor more than five thousand dollars, or by both such fine and imprisonment."

8. The validity of said statute so drawn in question was the validity thereof as its meaning was construed and applied by the Supreme Court in this case, which construction as made by the Supreme Court was that said section prohibited and made unlawful and felonious, peaceable picketing by a labor union to induce and persuade the appellee as a manufacturer of ice from selling ice to ice peddlers who were not members of the union so picketing. The meaning, scope and effect of such Missouri statute in this case is the statute as construed and applied by the Supreme Court of Missouri, and it is the validity of said statute as so construed and applied by the Supreme Court that is here drawn into question against the contention of appellants that said statute so construed and applied is in violation of the Constitution of the United States and particularly Amendments I and XIV thereof. All these matters and things are amplified and specified in the Assignment of Errors herewith filed by appellants in this cause.

Wherefore, petitioners pray for the allowance of an appeal from said Supreme Court of the State of Missouri

en banc to the Supreme Court of the United States in order that the decision of the said Supreme Court of the State of Missouri may be examined and reversed, and also pray that a transcript of the record, proceedings and papers in this case, duly authenticated by the Clerk of the [fol. 106] Supreme Court of the State of Missouri may be sent to the Supreme Court of the United States as provided by law and particularly as provided by Title 28, Section 344, U. S. C. A. Judicial Code, Section 225.

The errors upon which your petitioners claim to be entitled to an appeal are those above indicated and more fully set out in the Assignment of Errors filed herewith.

Dated 7th day of July, 1948.

Clif Langsdale, Clyde Taylor, Attorneys for petitioner and proposed appellants.

Address of Attorneys is 922 Scarritt Building, Kansas City, Missouri.

[fols. 107-108] Bond on Appeal for \$500.00 approved and filed July 9, 1948. Omitted in printing.

[fol. 109] [File endorsement omitted]

IN THE SUPREME COURT OF MISSOURI

En Banc

[Title omitted]

ASSIGNMENT OF ERRORS—Filed July 8, 1948

The Supreme Court of Missouri en banc erred in its final judgment in the following particulars, to-wit:

I

The Supreme Court of Missouri erred in holding that Section 8301 of Missouri Revised Statutes, Annotated, Volume 18, Section 8301, Page 516, was valid and not repugnant to Amendment One of the Constitution of the United States, the protection of which was timely and properly invoked by appellants; erred in holding that said Statute, so construed, rendered peaceable picketing by a labor union

in a labor dispute for a lawful purpose, unlawful, wherever such picketing resulted in restraint of trade or lessened competition: erred in holding that, under said Statute, enjoining such picketing did not abridge appellants' constitutional right of freedom of speech and of press under Amendment One, the protection of which was so invoked by appellants.

II

Prefatory to Assignment of Errors II:

Where the object (purpose) of a Labor Union in a labor dispute is lawful, peaceable picketing is an exercise of constitutional freedom of speech and of press; such freedom may not be abridged on the ground that such picketing incidentally results in lessened competition or restraint of trade, nor may it be abridged upon any other ground that falls short of clear and present danger to the public.

[fol. 110]

II

The State Court erred in holding that said Section 8301 was constitutionally valid and erred in issuing its final injunction prohibiting the picketing here involved pursuant to the divisions of said Statute, as by the Court construed, for the reason following:

There was here a labor dispute, notwithstanding there was no controversy between Empire and its immediate employees.

The sole object and purpose of the Union was lawful, that is, it was to increase its membership by inducing non-union Peddlers to become union Peddlers and to establish a minimum wage for their helpers.

The peaceable picketing was the exercise of freedom of speech and of press.

Restraint of trade and lessened competition, if any, was not the object or purpose of the Union but it was the incidental, casual, fortuitous result of the exercise of the constitutional right of freedom of speech and of press by the Union.

There was present no clear and present danger to the public, that would justify abridgment of what would otherwise be exercise of freedom of speech and of press, as exemplified by peaceable picketing.

In connection with this Assignment of Error attention is directed that whether there be clear and present danger to

the public justifying abridgment of freedom of speech, is a question of constitutional law for the Supreme Court of the United States and not a question of fact for the Supreme Court of the State.

III

The State Supreme Court erred in failing to hold that said Section 8301, as construed and applied in this case, was repugnant to Amendment One to the Constitution of the United States and was invalid; erred in failing to hold that peaceable picketing by a labor union in a labor dispute for a [fol. 111] lawful purpose, was the exercise of their constitutional right of freedom of speech and of press, without regard to whether such picketing resulted incidentally, casually and fortuitously in restraint of trade or lessened competition; the Court erred in failing to hold that enjoining such picketing under said Statute, so construed, would abridge appellants' constitutional right of freedom of speech and of press under said Amendment One.

IV

The State Court erred in holding that where peaceable picketing by a labor union in a labor dispute for a lawful purpose comes in conflict with a State Statute prohibiting a combination, confederation or understanding in restraint of trade or competition, then the Statute (as the Court held) prevails and under such Statute the labor union and its members could lawfully be enjoined from such picketing.

V

Prefatory to Assignment of Error No. V

Where there is conflict between the police power of the State to prohibit acts in restraint of trade or competition on the one hand and the asserted constitutional right of a labor union in a labor dispute to peaceably picket in furtherance of a lawful object on the other hand, if presents a question of constitutional law for decision by the Supreme Court of the United States. Here is has been held by the State Court that peaceable picketing for the lawful object of increasing membership in a union and establishing a minimum wage, becomes unlawful and enjoined if even the casual, incidental or fortuitous result thereof is to restrain trade

or lessen competition. Here the primary object of the picketing was to increase the membership of the union and to induce non-union Peddlers to become union Peddlers and to establish a minimum wage. The fact that such picketing could or did result in lessened competition and restraint of trade was an incidental, casual and fortuitous result thereof and not a primary result.

[fol. 112]

V

The State Court erred in holding that such incidental casual and fortuitous result justified an injunction abridging freedom of speech and of the press as exemplified by peaceable picketing that otherwise would be unlawful.

Clif Lingsdale, Clyde Taylor, Attorneys for Appellants.

[fol. 113]

[File endorsement omitted]

IN THE SUPREME COURT OF MISSOURI EN BANC

No. 40,099

[Title omitted]

GENERAL STATEMENT—Filed July 8, 1948

A brief statement of the essentials of the litigation here involved is made by way of preface to the end that the Assignment of Errors and the Jurisdictional Statement may be more readily understood. While not a part of either the Assignment of Errors or Jurisdictional Statement; it is asked that it be considered in connection therewith.

Nomenclature

Empire Storage and Ice Company, Plaintiff and Appellee, is herein sometimes called Empire.

Ice and Coal Drivers and Handlers Local Union 953, affiliated with American Federation of Labor, and individual members and representatives thereof, Defendants and Appellants, are collectively called The Union.

Those who buy ice wholesale from Empire and other ice companies and sell and deliver the same at retail are called Peddlars.

There are ~~two~~ hundred Ice Peddlars doing business in Kansas City, Missouri, eighty percent of whom are members of The Union. The Union engaged in a campaign to induce the remaining Peddlars to join The Union. One purpose of the campaign was to establish a minimum wage of four dollars (\$4.00) per day for a helper employed by a Peddlar. The Union had obtained the cooperation of all ice manufacturers and wholesale distributors of ice in Kansas City except Empire. Such other ice manufacturers would not sell ice to non-union Peddlars. Defendants being unable, after negotiations, to induce Empire to refrain from selling ice to non-union Peddlars placed a picket line at Empire's plant.

[fol. 114] There was no violence or disturbance of the peace, mass picketing or physical interference with ingress or egress from plaintiff's plant.

The sole, ultimate purpose of the picket line was to induce non-union Peddlars to join The Union.

Empire brought suit to restrain the picketing on the ground that it was pursuant to an unlawful conspiracy and combination in restraint of trade in violation of Section 8301 of the Missouri Statutes of 1939, and hence for an unlawful object. Defendants, at first opportunity, invoked their constitutional right of freedom of assembly, freedom of speech and freedom of the press under Amendment 1 of the Constitution of the United States. Such invocation of constitutional rights was preserved throughout all proceedings in the State Court.

Defendants also asserted throughout the proceedings that said Section 8301 (prohibiting pools, trusts and conspiracies in restraint of trade, see marginal note) was by the court made applicable to this situation then said Statute, so construed, was in violation of defendants' constitutional rights invoked as aforesaid.

The sole ground upon which it was asserted that the object of the picketing was unlawful was that it was in violation of said Section of the Statute.

That is to say it was not contended, the proof was all to the contrary, that the picketing was unlawful for any other reason.

The court of first instance and the Supreme Court of the State adjudged that said Section 8301 was applicable to this situation and was decisive of the issues framed herein; that the conduct of the defendants was in violation of said

Statute and that said Statute so construed and applied was a valid Statute and was not an invasion of the constitutional rights of the defendants so invoked by them.

Hence, here we have a final judgment in a suit in the highest court of the State of Missouri in which a decision [fol. 115] in the said suit could be had, and where there was drawn in the question of the validity of a Missouri Statute on the ground of its being repugnant to the Constitution of the United States and where the decision is in favor of the validity of such Statute.

The Missouri Statute involved is as follows:

"Any person who shall create, enter into, become a member of or participate in any pool, trust, agreement, combination, confederation or understanding with any person or persons in restraint of trade or competition in the importation, transportation, manufacture, purchase or sale of any product or commodity in the state or any article or thing bought or sold, whatsoever, shall be deemed and adjudged guilty of a conspiracy in restraint of trade and shall be punished as provided in said article."

The Missouri statute referred to in Section 8301 as providing the punishment for violation thereof is Section 8305 of Revised Statute of the State of Missouri, 1939, as follows:

"Any person violating any of the provisions of this article, or who shall do any act prohibited or declared unlawful by the provisions of this article, shall be adjudged guilty of a felony, and upon conviction thereof shall be punished by imprisonment in the penitentiary not exceeding five years, or by imprisonment in the county jail not exceeding one year, or by fine of not less than five hundred dollars nor more than five thousand dollars, or by both such fine and imprisonment."

Clif Langsdale, Clyde Taylor, Attorneys for Appellants.

[fol. 116] Citation in usual form, filed July 9, 1948, omitted in printing.

[fol. 117]

[File endorsement omitted]

IN THE SUPREME COURT OF MISSOURI

SITING EN BANC

[Title omitted]

ORDER ALLOWING APPEAL TO THE SUPREME COURT OF THE
UNITED STATES—Filed July 9, 1948

The petition of the above named appellants, in the above entitled cause, for an appeal therein to the Supreme Court of the United States, from the Supreme Court of the State of Missouri, en banc, and the Assignment of Errors and Statement as to Jurisdiction filed therewith, having been presented and considered:

It is ordered: That an appeal be, and it is hereby, allowed to the Appellants to the Supreme Court of the United States from the Supreme Court of the State of Missouri en banc, as prayed in said petition, and that the Clerk of the Supreme Court of Missouri shall prepare and certify a transcript of the record and proceedings in the above entitled cause, which shall be designated by precept filed with him by any of the parties, and transmit the same to the Supreme Court of the United States within thirty days from the date hereof.

It is further ordered: That the appellants do execute to the respondent their bond with surety, which is now approved by the undersigned in the sum of Five Hundred (\$500.00) Dollars, conditioned according to law.

W. A. Leedy, Jr., Chief Justice of the Supreme Court
of Missouri En Banc.

Dated: July 9, 1948.

[fol. 118] Clerk's Certificate to foregoing transcript.
omitted in printing.

[fol. 119] IN THE SUPREME COURT OF THE UNITED STATES

DEFINITE STATEMENT OF THE POINTS ON WHICH APPELLANTS
INTEND TO RELY—Filed July 29, 1948

Appellants filed in the State Court their Assignment of Errors, which document has been certified by the Clerk of the State Court and has been filed as a part of the record in this Court. Such Assignment, to the extent that counsel were able to do so, was prepared with studied brevity and confined to the errors and points to be relied upon considered essential. Such Assignments are adopted as the statement of points on which Appellants intend to rely and the same is presented for that purpose. For convenience of reference a copy of such Assignment is hereto attached and made a part hereof.

Clif Langsdale, Clyde Taylor, Attorneys for Appellants.

Service acknowledged this 27th day of July, 1948.

(S.) Richard K. Phelps, Jerry T. Duggan, Attorney for Appellee.

[fols. 120-123] ASSIGNMENT OF ERRORS OMITTED IN PRINTING

[fol. 124] IN THE SUPREME COURT OF THE UNITED STATES

APPELLANT'S DESIGNATION OF THE PARTS OF THE RECORD
THOUGHT BY APPELLANTS TO BE NECESSARY FOR THE CON-
SIDERATION OF THE CAUSE AND DESIGNATED TO BE PRINTED
—Filed July 29, 1948

Counsel for Appellants conceive that the entire record as certified by the Clerk of the State Court is necessary for consideration of the cause and hence request Clerk of the Supreme Court of the United States to print all thereof, under the provisions of paragraph 9 of Rule 13.

Clif Langsdale, Clyde Taylor, Attorneys for Appellants.

Service acknowledged this 27 day of July, 1948.

Richard K. Phelps, Jerry T. Duggan, Attorney for Appellee.

[fol. 124a] [File endorsement omitted]

[fol. 125] SUPREME COURT OF THE UNITED STATES

ORDER NOTING PROBABLE JURISDICTION—October 11, 1948

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

Endorsed on Cover: File No. 53,184. Missouri, Supreme Court, Term No. 182. Joseph Giboney, Harold Hackell, Paul Mandalia, et al., Appellants, vs. Empire Storage and Ice Company. Filed July 29 1948. Term No. 182 O.T. 1948.

(8954)